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THE ATTACHMENT GAP: EMPLOYMENT DISCRIMINATION LAW, WOMEN'S CULTURAL CAREGIVING, AND THE LIMITS OF ECONOMIC AND LIBERAL LEGAL THEORY

Laura T. Kessler*

Title VII has prohibited employment discrimination on the basis of pregnancy since 1978, when Congress passed the Pregnancy Discrimination Act ("PDA"), but it does not require employers to recognize women's caregiving obligations beyond the immediate, physical events of pregnancy and childbirth. The Family and Medical Leave Act of 1993 ("FMLA") also does little more than provide job security to some relatively privileged women in the case of childbirth. Neither of these statutes, which constitute the bulk of the United States' maternity and parental leave policies, provides for the most common employment leave needs of caregivers, who by all measures are disproportionately women. This lack of protection has served to perpetuate a significant labor force "attachment gap" between men and women that has had serious economic and social consequences for women and children.

This Article examines the theoretical bases for the law's inability to recognize women's cultural caregiving, i.e., the caregiving work that women perform within the family that is unrelated to reproductive sex differences. Why has our law failed to address the conflicts between work and family that continue to disproportionately burden women? The author suggests that the answer lies in Title VII's categorical framework, which is fundamentally unable to account for cultural experiences that are not universally shared by all women; in societal and judicial commitments to formal equality; and in the pervasive influence on our law of certain core concepts underlying liberal and economic theory, particularly the value of formal equality and the assumption that legal agents are autonomous, rational decision makers.

In the final part of the Article, the author reviews some of the primary responses offered by feminist legal theorists to the dominant paradigm, and suggests that such responses have failed to challenge it fully. Feminist theorists have focused on characterizing women's experiences of caregiving as a condition of impaired

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agency growing out of gender socialization, attempting to fit women's nurturing work into the limited but recognized exceptions to the autonomous, equal, and rational person assumed by the dominant framework. While this strategy has worked to obtain legal recognition of women's biological experiences of pregnancy and childbirth, this Article suggests that it has proved less capable of addressing the rhetoric of choice that legitimates discrimination on the basis of women's cultural experience of caregiving. It is clear that a refinement of the theoretical constructs underlying our law will be necessary before there will be any significant recognition of women's disproportionate responsibility for caregiving as it affects their wage work. This Article suggests that the beginnings of such a construct should focus on the fundamental importance and value to society and to women of women's caregiving labor, not upon depictions of caregiving as a socially-determined, gendered activity. The Article concludes by outlining the beginnings of an alternative paradigm on which to build a theory of workplace accommodation for women's unpaid caregiving work, and reviews a number of concrete legal reforms that might be consistent with this alternative vision.

INTRODUCTION

Women, more so than men, perform the unpaid family caregiving work within our society. Women are primarily responsible for the care of children and housekeeping, whether or not they work outside the home for wages.¹ It is women, more so than men, who care for sick or disabled family members.² Women more often than men arrange or provide care for elderly parents.³ While recent studies indicate that the amount of time spent by women on childcare and housework has declined since the 1970s, that decline has been minimal.⁴ The American workplace and discrimination laws governing employment have yet to address seriously this profound existential difference between men and women with regard to caregiving,⁵ despite women's substantial presence in the paid labor

1. See *infra* Part I.

2. See *infra* Part I.

3. See *infra* Part I.

4. See *infra* Part I.

5. Of course, the failure of our law and culture more broadly to value women's caregiving work is manifested in myriad ways, not just in the lack of protection from sex discrimination in employment. For example, the state's failure to recognize the value of unmarried, poor women's mothering has resulted in draconian welfare policies which push poor women with young children into the labor force, often, ironically, into low-paid jobs providing childcare to more privileged women. See generally MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1989) (documenting the historical role of American social welfare policy in stigmatizing and punishing women who do not conform to the traditional "family ethic" of marriage and motherhood) [hereinafter ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN*]; MIMI ABRA-

force for more than two decades.⁶ This Article examines the theoretical bases for the law's inability to recognize or accommodate women's family caregiving work that is understood within our

MOVITZ, UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES (1996) (recounting the gendered history of welfare in America and challenging the 1990s assault on impoverished single mothers); KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 167-78, 235 (1997) (finding, based on a study of single mothers receiving welfare, that almost half engaged in market work to make ends meet, and suggesting that workfare is likely to leave welfare recipients significantly worse off, because it requires such women to quit their informal existing jobs); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 101-42 (1995) (articulating the way in which poverty discourses in the context of welfare policy construct mothering in single parent families as deviant) [hereinafter FINEMAN, THE NEUTERED MOTHER]; FRANCES FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 371-87 (updated ed. 1993) (depicting welfare as a mechanism to coerce workforce participation and contain social unrest); Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J.L. & FEMINISM 99, 119, 126-29 (1989) (providing qualified support for the work-related welfare reforms contained in the Family Support Act of 1988 and tracing the role of women's organizations, as well as capitalist and patriarchal interests, in bringing about such reforms); Laura T. Kessler, *PPI, Patriarchy, and the Schizophrenic View of Women: A Feminist Analysis of Welfare Reform in Maryland*, 6 MD. J. CONTEMP. LEGAL ISSUES 317, 359-64 (1995) (arguing that the medfare, learnfare, and workfare welfare "experiments" in Maryland and states across the county in the early 1990s perpetuated a "schizophrenic" view of women receiving welfare by requiring them both to conform to an idealized vision of motherhood and to work full time outside the home for wages); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1252-54 (1983) (arguing that federal welfare-to-work programs devalue women's role as both caretakers of children and waged workers, since the "work" typically pushed on women who receive welfare is low-paid, sex-segregated work consistent with stereotypical gender roles); *Welfare Symposium*, 9 STAN. L. & POL'Y REV. 4 (1998) (compiling articles that analyze the Temporary Assistance for Needy Families (TANF) block grant program, by which the federal government ended welfare as a federal entitlement and required states to move poor parents into the paid labor force); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (demonstrating the empirical inaccuracies underlying the learnfare and family cap "welfare reforms").

The state's failure to value the family caregiving work that women disproportionately perform within marriage renders them poorer *vis-à-vis* men upon divorce. There is a vast literature on the relationship between the law of domestic relations and the impoverishment of women post-divorce. *E.g.*, TERRY ARENDELL, MOTHERS AND DIVORCE (1986); DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kay eds., 1990); MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 53-75 (1991); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justifications for Alimony*, 82 GEO. L.J. 2423, 2426 n.14 (1994) (collecting citations); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2227 n.1 (1994) (collecting citations).

With the state's complicity, women's paid caregiving work is also undervalued. Teachers, nurses, non-professional health care workers, and childcare and food service workers, among other workers in sex-segregated occupations that focus on caregiving, receive considerably less pay than workers in non sex-segregated occupations. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Usual Weekly Earnings of Wage and Salary Workers: Fourth Quarter 1998, 1-2 tbl.3 (Jan. 20, 1999), available at <http://stat.bls.gov/newsrels.htm>.

6. See *infra* Part II.A.

society to be culturally based, *i.e.*, unrelated to biological sex differences.

Title VII has prohibited employment discrimination on the basis of pregnancy since 1978,⁷ when Congress passed the Pregnancy Discrimination Act ("PDA"),⁸ but it does not require employers to recognize women's caregiving responsibilities beyond the immediate, physical events of pregnancy and childbirth. The passage of the Family and Medical Leave Act of 1993 ("FMLA"),⁹ which requires covered employers to provide employees up to twelve weeks of unpaid leave per year for the birth or adoption of a child or for the care of seriously ill family members, seemed to alter this state of affairs. However, a close examination of the FMLA reveals that it does little more than provide job security to some women in the case of childbirth. Neither of these statutes, which constitute the bulk of the United States' maternity and parental leave policies, provides for the most common employment leave needs of caregivers, who by all measures are disproportionately women.¹⁰

To be sure, such statutes, particularly Title VII, facilitated the mass entrance of women into the workforce over the last three decades. Married women's labor force participation nearly doubled from 1969 to 1998.¹¹ The increase was even more pronounced for married women with children less than three years of age, increasing almost threefold over the same period.¹² The role of employment discrimination laws in effecting this social transformation should not be understated. Title VII has challenged discrimination in the hiring and promotion of women based upon the stereotypical view that their status as caregivers makes them unsuitable for market work, both by reinforcing the perception of

7. In 1964, as part of the Civil Rights Act, Congress passed Title VII to prohibit employment discrimination on the basis of sex, among other classifications. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253-66 (codified as amended at 42 U.S.C. § 2000e to 2000e-16 (1994)) [hereinafter Title VII].

8. Pub. L. No. 95-555, 92 Stat. 2076 (codified at § 42 U.S.C. § 2000e(k) (1994)) (amending Title VII to include pregnancy-based discrimination as a prohibited form of sex discrimination); *see also* discussion *infra* Part II.B.1.a.

9. Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (1994)). The FMLA generally requires covered employers to provide up to twelve weeks of unpaid leave during a twelve-month period to any eligible employee who needs the time off (1) for a serious health condition of the employee that prevents him/her from performing the essential functions of his/her job; (2) to care for the employee's spouse, son, daughter, or parent where that family member has a serious health condition; (3) for the birth of a child of the employee, in order to care for the child; and (4) for the placement of an adopted or foster child with the employee. 29 U.S.C. § 2612(a)(1); *see also* discussion *infra* Part II.C.

10. *See infra* Part II.

11. U.S. DEP'T OF LABOR, REPORT ON THE AMERICAN WORKFORCE 96, 98 chart 3-22 (1999) [hereinafter DOL REPORT ON THE AMERICAN WORKFORCE].

12. *Id.* at 96, 98 chart 3-23.

women as wage earners and by providing some formal legal protections to women. The FMLA has afforded some women job security with regard to the significant life event of childbirth. Still, as this Article demonstrates, an examination of judicial decisions applying and interpreting Title VII and the FMLA reveals that these laws are of limited use to women who, once in the labor force, are demoted or terminated on the basis of their cultural caregiving responsibilities to their families.¹³ By cultural caregiving, I mean the nurturing work performed by women that is understood by the law and society more broadly to be a function of gender socialization or an ethic of care.

Why has our law failed to address the conflicts between work and family that continue to disproportionately burden women? This Article suggests that the answer lies, in part, in the pervasive influence of certain core concepts underlying liberal and economic theory on cultural and legal discourse, on legal decision makers, and ultimately on our employment discrimination laws.¹⁴ Specifically, the theoretical constructs of autonomy, equality, and rational choice, which constitute the foundations of our legal system, possess a limited ability to recognize women's experiences that are not grounded in immutable biological difference. First, the assumption underlying both liberal and neoclassical economic theory that humans are autonomous, unencumbered actors has formed the foundation for the current structure of the workplace and our employment discrimination laws, which are modeled on an "ideal worker"¹⁵ who has no caregiving responsibilities.¹⁶ Second, equality theory possesses only a limited ability to recognize cultural differences between men and women such as women's caregiving, for the simple reason that cultural differences that are generally but not always true for women escape categorization as sex-based classifications under the law.¹⁷ Finally, the oversimplified strain of neoclassical economic theory that has come to pervade our country's political and legal discourse, and the influence of rational choice theory in particular, have served to construct women's caregiving as a freely chosen endeavor that is undeserving of protection from discrimination within the workplace.¹⁸

13. See *infra* Part II.

14. See *infra* Part III.

15. Joan Williams has described the theoretical employee unencumbered by caregiving responsibilities as the "ideal worker." Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822 (1989).

16. See *infra* Part III.

17. See *infra* Part III.

18. See *infra* Part III.

Yet, there are circumstances when even the dominant theories that so greatly influence our law recognize that a person is not autonomous, equal, or rational. The traditional exceptions include those circumstances when a person is disabled by force, fraud, duress, or incapacity.¹⁹ Women's unique biological experiences of pregnancy and childbirth—particularly childbirth, when women are literally connected to human life and incapacitated by nature—are consistent with such exceptions. Understood in this way, Title VII, the PDA, and the FMLA, which focus primarily on the impact of the physical experiences of pregnancy and childbirth on women's labor force participation, represent limited but traditional exceptions to the model of the autonomous, equal, and rational person underlying liberal and neoclassical economic theory and our law.

This Article reviews some of the responses by feminist legal theory to the limitations of the dominant theoretical framework shaping discrimination law, and concludes that the predominant responses have failed to challenge it fully.²⁰ Feminist theorists, both within law and other disciplines, have focused on characterizing women's experiences of caregiving as a condition of impaired agency, attempting to fit women's nurturing work into the limited but recognized exceptions to the autonomous, equal, and rational person assumed by the dominant framework.²¹ While successfully contesting certain aspects of the prevailing theoretical construct, this Article suggests that such responses have had the unintended effect of reinforcing the existing paradigm. For, while the dominant account of women's "gendered li[ves]"²² at the center of the

19. See *infra* note 374 and accompanying text.

20. See *infra* Part IV.

21. See *infra* Part IV.

22. Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 37 (1990) (developing the term "gendered life" to describe a common set of socially and culturally imposed harms experienced, or at least potentially experienced, by all women). It should be noted here that the term "gender" is commonly used to describe a number of related but distinct phenomena, including (1) biological sex differences; (2) the complex societal system which assigns meaning on the basis of those differences, *i.e.*, social construction; and (3) the process by which that societal system, in turn, is internalized by individual women such that their behavior is shaped and limited, *i.e.*, gender socialization. See generally SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* (1993) (examining the ways in which gender as a social construct shapes our views of social reality); MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* (2000) (reviewing and rejecting both biological and social psychological explanations for gender differences, and endorsing the "social constructionist" approach); DEBORAH L. RHODE, *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (1990) (examining from a variety of disciplinary perspectives the recurring questions about the nature, origins, and consequences of sexual difference). This Article uses the term gender in the latter two respects.

modern women's movement and of much feminist theorizing about law has served as a valuable organizing principle for obtaining legal recognition of pregnancy and childbirth, it has proved to be less capable of addressing the rhetoric of choice that legitimates discrimination on the basis of women's cultural caregiving work. It is clear that a refinement of the theoretical constructs underlying our law will be necessary before there will be any significant recognition of women's disproportionate responsibility for caregiving as it affects their wage work. This Article suggests that the beginnings of such a construct should focus on the fundamental importance and value to society of women's caregiving labor, not upon depictions of caregiving as a socially-determined, gendered activity.

Part I provides an empirical account of women's disproportionate responsibility for caregiving within the family, highlighting the ways in which such caregiving work negatively impacts women's labor market participation and economic status. Part II details the limitations of Title VII and the Family and Medical Leave Act, both in their initial conception and as applied and interpreted by judicial decision makers. Specifically, Part II demonstrates that, while our country's antidiscrimination laws have facilitated women's entrance into and advancement in the workforce over the past few decades, they have afforded women little protection from demotion or termination on the basis of their family caregiving responsibilities. This lack of protection has resulted in a persisting labor force attachment gap between men and women that has had serious economic and social consequences for women and children. Building on the empirical and doctrinal analyses in Parts I and II, the Article then takes a theoretical turn. Part III suggests that this serious limitation in the law is attributable, in part, to the ascendancy of certain values and assumptions within our society and legal system, particularly the value of formal equality and the assumption that legal agents are autonomous, rational decision makers. Part IV discusses some of the responses to this paradigm posed by feminist legal theorists, and suggests that those responses have failed to challenge it fully. Part V outlines the beginnings of an alternative paradigm on which to build a theory of workplace accommodation for women's unpaid caregiving work, and reviews a number of concrete legal reforms that might be consistent with this alternative vision.

I. WOMEN'S CULTURAL CAREGIVING WORK AND THE LABOR FORCE ATTACHMENT GAP

Women, more so than men, perform the caregiving²³ work within the family and society. The truth of this statement is supported by a voluminous body of social science research and is evident from even a cursory survey of the world around us. Women are primarily responsible for the care of children and housekeeping, whether or not they work outside the home for wages.²⁴ It is

23. The term caregiving, not caretaking, is used to describe the work of attending to the physical and emotional needs of dependents, because caregiving within the family is uncompensated. Feminist legal scholars have identified the importance and significance of language in feminist endeavors. See, e.g., FINEMAN, *THE NEUTERED MOTHER*, *supra* note 5, at 9 (consciously using "caretaker" to describe women's nurturing, because it is work, not a gift); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 886 (1989) ("[I]t is an imperative task for feminist jurisprudence . . . to turn critical attention to the nature of legal reasoning and the language by which it is expressed."); Martha Minow, *The Supreme Court 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10, 61 (1987) ("Feminists' work has thus named the power of naming . . .").

24. SARAH FENSTERMAKER BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* 128 tbl.5.1, 170 tbl.6.1 (1985) (showing that, whether measured as the frequency and number of tasks performed each month, or the minutes of housework time spent each day, wives performed, on average, seventy percent of the household labor as compared to either their husbands or children); VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 78 tbl.5.1 (1988) (showing that in 1986 adult women in the United States spent an average of 1,419 hours a year on housework and childcare, while adult men spent an average of 603 hours a year on such tasks); ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 3-4 (1989) (finding that women worked an extra month of twenty-four-hour days each year); BETH ANNE SHELTON, *WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE* 66 tbl.4.1, 145 (1992) (finding that, from 1975 to 1987, employed men's housework as a percentage of women's increased only eleven percent, from forty-six to fifty-seven percent); Suzanne M. Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79(1) SOC. FORCES 191, 196 (2000) (reviewing sociological literature over the past twenty years which "unequivocally" show that women invest significantly more hours in household labor than do men despite some narrowing of gender differences in recent years); Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MAR. & FAM. 1208 (2000) (reviewing more than 200 scholarly articles and books on household labor showing that women still do at least twice as much housework as men); Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 97 (1993) (noting that even women who earn more than men remain responsible for the caretaking of children and other family responsibilities); Laura Sanchez & Elizabeth Thomson, *Becoming Mothers and Fathers: Parenthood, Gender, and the Division of Labor*, 11 GENDER & SOC'Y 747, 765 tbl.4 (1997) (showing that when housework, childcare, and wage work are all considered, women with young children work, on average, twenty more hours a week than men); Beth Anne Shelton, *The Division of Household Labor*, 22 ANN. REV. SOC. 299, 299-300 (1996) (reviewing research which shows that, whether employed or not, women continue to do the majority of housework, i.e., between sixty-five and eighty percent); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8-10 (1996) (reviewing sociological studies showing that, by all measures, women perform substantially more

women, more so than men, who care for sick or disabled family members.²⁵ Women more often than men arrange or provide care for elderly parents.²⁶ While recent studies indicate that the amount of time spent by women on caregiving and housework has declined since the 1970s, women continue to spend considerably more time than men doing such work.²⁷ From the 1970s to the 1990s, the amount of time spent by women on such work declined from four times that spent by men to two or three times that spent by men.²⁸ Much of this small improvement is attributable to an overall decline in the hours of housework performed by women, as opposed to an increase in such work performed by men.²⁹ Moreover, when childcare and routine, stereotypically female tasks are considered, progress with regard to the gendered division of household labor is less remarkable still.³⁰

In an effort to garner societal recognition of women's caregiving, feminist theorists have worked to provide a rich, complex,

housework than men, regardless of their employment status); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 520 n.18, 522 n.21 (1998) (collecting sociological studies showing that the work-leisure gap always favors the husband).

25. Eliza K. Pavalko & Julie E. Artis, *Women's Caregiving and Paid Work: Causal Relationships in Midlife*, 52B J. GERONTOLOGY SERIES B: PSYCHOL. SCI. & SOC. SCI. 170, 177-78 (July 1997) (finding that care of elderly, ill, or disabled family members or friends is disproportionately done by women and that such responsibilities often coincide with the peak of women's labor force participation, causing many women to reduce their hours or to stop working).

26. *Id.*; see also EMILY K. ABEL, WHO CARES FOR THE ELDERLY? PUBLIC POLICY AND THE EXPERIENCES OF ADULT DAUGHTERS 4, 128 (1991) (noting that seventy-seven percent of all adult children providing care to elderly parents are women); Patricia Braus, *When The Helpers Need a Hand*, 20 AM. DEMOGRAPHICS 66, 67 (1998) (finding that women make up seventy-three percent of caregivers tending to elderly parents); Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 387 n.26 (1984-85) (reviewing research showing that women primarily act as caregivers for elderly parents).

27. See *supra* note 24.

28. Francine D. Blau, *Trends in the Well-Being of American Women, 1970-1995*, 36 J. ECON. LITERATURE 112, 150-55 (1998); Coltrane, *supra* note 24, at 1208.

29. JOHN P. ROBINSON & GEOFFREY GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME* 107-09 (1997) (showing that the decline in the average weekly hours spent on family care by women from 1965 to 1985 was more than double the increase of such care performed by men); SHELTON, *supra* note 24, at 145 (finding that a significant part of the small increase in men's housework time as a percentage of women's from 1975 to 1987 was a function of a decrease in women's time); Bianchi, *supra* note 24, at 208 tbl.1 (reporting similar results regarding housework for the period of 1965 to 1995).

30. Bianchi et al., *supra* note 24, at 209 tbl. 1 (showing that, while women performed about twice as much total housework per week as men in 1995, they did about four times the amount of "core housework," i.e., cooking, meal cleanup, housecleaning, and laundry); Sanchez & Thomson, *supra* note 24, at 756 (showing that in 1994, although couples without children divided their total combined hours of housework and wage work roughly evenly (albeit in a gendered manner), women in families with children contributed almost two-thirds of the total family work hours).

problematized account of women's nurturing experiences. Liberal feminism began this project more than two decades ago by depicting the confinement of women to the private sphere of nurturing and homemaking as stultifying and oppressive.³¹ As the liberal feminist critique has highlighted, caregiving is intensely physical. Because much caregiving work focuses on attending to bodily functions, such work often involves unpleasant, messy, and strenuous physical tasks.³² It is women, primarily, who come into contact with feces, urine, vomit, blood, saliva, and mucus.³³ It is women, primarily, who literally carry, lift, and support others' bodies, whether young children or persons who are sick or elderly.³⁴ Caregiving is also mentally taxing. Caregiving requires the ability to focus simultaneously on multiple tasks and to be attentive to the emotional needs of others. Such work can be self-annihilating, mind deadening, and repetitive. Caregiving can be dream deferring and socially isolating. This critique of the oppressive nature of women's caregiving responsibilities—caring for children, the sick, and the aged; cooking and cleaning; and the sexual and emotional nurturance of men—continues today.³⁵

31. Housework, rather than wage work, preoccupied feminist writers in the early days of the modern feminist movement. See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 19 (1963) (uncovering the empty life of the 1950s American housewife as "the problem that has no name"). To a certain extent, this focus continues today. See Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 61 (1997) (criticizing modern feminism for "focus[ing] primarily on the situation of women in one location: the isolation of women in the private, domestic sphere"). Actually, feminist criticism of domesticity can be traced to the Women's Suffrage Movement and the Postbellum Period, though the focus of the early feminists was on gaining monetary compensation for women's domestic labor, not upon challenging their domestic role, *per se*. Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1166, 1189-91 (1994).

32. Studies show that within the family, women do the more routine physical tasks of childcare while men do more play, discipline, and education. *E.g.*, SCOTT COLTRANE, *FAMILY MAN* 48-49, 91 (1996).

33. My vulgarity here represents a purposeful attempt to bring home what more delicate descriptions such as "changing diapers" and "wiping runny noses" so well hide.

34. While there exists limited data on the incidents of injuries to women from the physical tasks of caregiving within the family, studies of those who perform caregiving work within the market provide a clue. Both home and institutional health and personal care workers experience job-related injuries at rates double or more than the national rate for all occupations; such injuries include overexertion from lifting patients, bending, twisting, and reaching, as well as falling. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, SUMMARY 97-4, ISSUES IN LABOR STATISTICS: INJURIES TO CAREGIVERS WORKING IN PATIENTS' HOMES (1997), available at <http://www.bls.gov/opub/ils/pdf/ofbils11.pdf>.

35. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME & HOME BECOMES WORK* *passim* (1997) (portraying caregiving at home as increasingly unappreciated, rushed, tense, unfulfilling, and exhausting, particularly in comparison to the modern workplace); ROBIN WEST, *CARING FOR JUSTICE* 126 (1997) (depicting housework and caregiving as tiring, repetitive, labor-intensive, and boring work, creating "impotent rage" which is "not carried lightly"); Katherine M. Franke, *Theorizing Yes: An Essay*

A more recent feminist project, both within law and other disciplines, explores the positive side of women's caregiving, if not by depicting caregiving work as necessarily or exclusively pleasurable, then at least by asserting the fundamental morality of such work. Carol Gilligan's research showing that women and girls possess a unique ethic of care and responsibility is a classic example.³⁶ In law, Martha Fineman has articulated the moral basis for a theory of collective societal responsibility for dependency.³⁷ Critical Race Feminism has highlighted the social, political, and spiritual importance of family caregiving work for women of color, who historically have been deemed unfit to nurture their own children and who have never had the luxury of receiving state "protection" from the labor market.³⁸ This is particularly so when black women's caregiving is considered within the context of the historical and continuing control over their reproduction and labor through slavery, Jim Crow, sterilization abuse, welfare, and surrogacy.³⁹ Still other feminist scholars have depicted women's

on *Feminism, Law, and Desire*, 101 COL. L. REV. 181, 183-85 (2001) (suggesting that motherhood, and the expectation that all women will reproduce in their lifetimes, are a product of cultural oppression).

36. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). According to Gilligan:

The moral imperative . . . [for] women is an injunction to care, a responsibility to discern and alleviate the "real and recognizable trouble" of this world. For men, the moral imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment.

Id. at 100. Gilligan and her colleagues have since published several books and collections that build on her earlier work. See LYN MIKEL BROWN & CAROL GILLIGAN, MEETING AT THE CROSSROADS: WOMEN'S PSYCHOLOGY AND GIRLS' DEVELOPMENT (1992) (studying the struggles of adolescent girls who are in the process of developing their female identities); MAKING CONNECTIONS (Carol Gilligan et al. eds., 1990) (discussing the relational world of adolescent women); MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION (Carol Gilligan et al. eds., 1988) (discussing differences in moral voice and moral orientation); JILL MCLEAN TAYLOR ET AL., BETWEEN VOICE AND SILENCE: WOMEN AND GIRLS, RACE AND RELATIONSHIPS (1995) (recording the experiences of a culturally and racially diverse group of girls over three years); WOMEN, GIRLS, AND PSYCHOTHERAPY: REFRAMING RESISTANCE (Carol Gilligan et al. eds., 1991) (compiling articles on women's psychological development).

37. See generally Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 13-15 (1999) (arguing that there is a compelling need to reconsider the basic distribution of responsibility for dependency among societal institutions).

38. Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 *passim* (1997).

39. See generally DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY (1997) (addressing the many dimensions of governmental regulation of black women's reproductive decisions and the impact of this repression on the way Americans think about reproductive liberty); see also Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER L.J. 17, 31 (1991); Cheryl I. Harris, *Finding*

caregiving experiences as simultaneously pleasurable and painful, leading women both to fear separation from those they nurture and to seek independence from them,⁴⁰ and as both a source of power and oppressive role conformity for women.⁴¹

Concomitant with the wealth of feminist scholarship exploring the significance of caregiving to women has been a parallel exploration of the meaning in women's lives of wage work. Feminist scholars have depicted wage work as a source of intellectual fulfillment, empowerment, individuation, and social connection for women, both explicitly⁴² and implicitly,⁴³ and often within the very same works exploring the significance of family caregiving.⁴⁴ Yet feminist legal scholars also have criticized this positive depiction of wage work for ignoring the real harm, degradation, and oppression of the workplace experienced by less privileged women,⁴⁵ and most acutely experienced by women of color living in poverty.⁴⁶

Sojourner's Truth: Race, Gender, and the Institution of Property, 18 CARDOZO L. REV. 309, 337-39 (1996); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 81-82 (1999).

40. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-21 (1988).

41. See Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 526 (1999).

42. See, e.g., ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH CENTURY AMERICA (forthcoming 2001) (manuscript at 14, on file with author) (describing work and opportunities for self-support as crucial to full participation in a democratic society); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92, 1959-61 (2000) (describing work as important for women and as constitutive of citizenship, community, and personal identity).

43. For example, feminist legal scholarship urging workplace accommodation of pregnancy and family caregiving is based on the assumption, whether stated or not, that women's work outside the home is a positive experience from which women benefit. See, e.g., Linda Krieger & Patricia Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 517-18 (1983) (arguing for the accommodation of pregnancy in the workplace); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007-13 (1984) (arguing for equal treatment in the workplace except in areas relating to reproduction).

44. See, e.g., FRIEDAN, *supra* note 31, at 336 ("Women, as well as men, can only find their identity in work that uses their full capacities.").

45. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 152 (2000) ("Working-class women's identity is 'multifaceted,' framed not only around work but around family and other roles as well. This is true in part because some three-fourths of working-class women hold low-status, low-paying, traditionally female jobs.").

46. Evelyn Nakano Glenn, *Cleaning Up/Kept Down: A Historical Perspective on Racial Inequality and "Women's Work"*, 43 STAN. L. REV. 1333, 1336-53 (1991) (providing an account of the special forms of workplace exploitation faced by women of color from the mid-nineteenth century to the present, including segregation in dangerous, demeaning or unstable jobs, wage inequality, and relegation to the dirtiest service occupations); Roberts, *supra* note 38, *passim* (describing the menial aspects of caregiving that black and other minority women historically have been relegated to perform in the labor market). Of course, this critique of work has not been limited to feminist concerns. There is a vast wealth of literature exploring the darker side of work generally and the failure of work to deliver on

As this rich body of scholarship demonstrates, a woman's experiences of wage work and caregiving are dependent upon her place within the larger social context and are as complex as the institutions of work and family themselves. Any consideration of the problems confronted by women caught in the intersection of family and market work must be attentive to differences among women, both in its theoretical understanding and proposed solutions.⁴⁷ Yet there is also a compelling need to identify commonalities among women and to resist the current trend, within the academy and without, to dismiss the continuing relevance of "women" as an analytic category.⁴⁸

One such commonality is the fact that, today, most women must work in order to support their families. Given the decrease in real wages over the last several decades, the breakdown of the family wage system,⁴⁹ and the emergence of the single-parent family as a prominent family form, the recent explosion of women's labor force participation can be explained as a matter of sheer economic necessity. An unprecedented divorce rate of fifty percent and an increase in out-of-wedlock births have left millions of women to struggle as the heads of households to support themselves and their children. Of families with children less than eighteen years

the American Dream. See, e.g., STUDES TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* (1972); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997).

47. Indeed, one of the aims of this Article is to unerase less privileged women from the predominant theoretical, doctrinal, and legislative discourses addressing women's work and family conflicts.

48. Feminist legal theorists have addressed the benefits and dangers of antiessentialism in feminist endeavors. WEST, *supra* note 35, at 5–17 (critiquing the postmodern denial of the self, and the connected self in particular, as peculiarly harmful to women); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152–60 (arguing that viewing discrimination on the single axis of race or gender distorts the experience of black women); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, *passim* (1992) (arguing that a concept of women's differences from men is necessary to remedy socially and culturally imposed harms to women); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 590–92 (1990) (criticizing theories of feminism that focus solely on experiences of gender and neglect the impact of other factors such as race); Christine Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 15–16 (1991) (arguing that framing policy issues in gender neutral terms overlooks the importance of women's experience).

49. See Barbara Ehrenreich & Frances Fox Piven, *The Feminization of Poverty: When the "Family-Wage System" Breaks Down*, 31 DISSENT 162, 162–64 (1984). The "family wage" refers to the ability of a man to earn an income sufficient to support his wife and children. For the history of the family wage ideal in the United States, see Martha May, *Bread Before Roses: American Workingmen, Labor Unions, and the Family Wage*, in *WOMEN, WORK, AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR HISTORY* 1 (Ruth Milkman ed., 1985).

old, about one-third are single parent households.⁵⁰ Single women heads of household must work full-time in the paid labor force to keep their families above the poverty line; many are unsuccessful.⁵¹ Today, even married women's paid work is necessary to provide the basics for their families,⁵² given the stagnation, or, in the case of the least skilled, the substantial decline, in the real wages of men.⁵³ Finally, studies show a correlation between married women's labor force participation and the rise of no-fault divorce.⁵⁴ With decreased opportunities under modern no-fault rules for women to receive alimony upon divorce,⁵⁵ married women's work serves as a form of insurance against impoverishment in the eventuality of divorce.⁵⁶ By 1998, over three-quarters of mothers were participating in the labor force, including two-thirds of those with children under age six.⁵⁷

But these dramatic social and economic changes do not tell the whole story. Labor force participation rates merely indicate whether women are working.⁵⁸ They do not reveal the extent of

50. Lynne M. Casper & Ken Bryson, *Household and Family Characteristics: March 1998 (Update)*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REP. P20-515, at 108 tbl.11 (Oct. 1998) [hereinafter CENSUS HOUSEHOLD/FAMILY CHARACTERISTICS].

51. Census data show that persons in female-headed single-parent households are much more likely to be poor than persons in two-parent families: 43.1% of female-headed single-parent households fell below the poverty line for at least two months in 1990, compared with 12.7% of two-parent families. Martina Shea, *Dynamics of Economic Well-Being: Poverty, 1990 to 1992*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REP. P70-42, at 3 & 5 tbl.A (Jan. 1995).

52. Peter Cattán, *The Effect of Working Wives on the Incidence of Poverty*, MONTHLY LAB. REV., Mar. 1998, at 22, 27-28 (finding that wives' earnings in married-couple families play a major role in keeping their families above the poverty line, particularly in non-white families).

53. Frank Levy, *Incomes and Income Inequality*, in STATE OF THE UNION: AMERICA IN THE 1990s 1, 43-45 (Reynolds Farley ed., 1995).

54. Allen M. Parkman, *Why Are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41, 48-49 (1998) (finding that married women living in no-fault divorce states devote 4.5 more hours per week to wage work than those living in fault-based divorce states).

55. WEITZMAN, *supra* note 5, at 163-80 (finding, *inter alia*, that no-fault has resulted in a shift from permanent to short-term alimony awards, a reduction in the percentage of settlements involving alimony, and the virtual elimination of alimony after short-term marriages); Singer, *supra* note 5, at 2424-28 (summarizing the history of the breakdown of the fault-based regime).

56. Parkman, *supra* note 54, at 43. Ironically, this behavior often has been a self-fulfilling prophecy for women. As Martha Fineman has pointed out, because "maternal work is incompatible with the traditional model of marriage," the increase in divorce rates can be explained, in part, by the growth of women's labor force participation. Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform"*, 36 SANTA CLARA L. REV. 287, 297-98 (1996).

57. See DOL REPORT ON THE AMERICAN WORKFORCE, *supra* note 11, at 140 tbl.6.

58. Howard V. Hayghe & Suzanne M. Bianchi, *Married Mothers' Work Patterns: The Job-Family Compromise*, MONTHLY LAB. REV., June 1994, at 24.

women's labor force participation, *i.e.*, whether it is full-time or part-time, permanent or temporary, or how much time women spend engaged in market work over any extended period.⁵⁹ Herein lies a second important commonality among women: women's disproportionate share of family caregiving and housework has resulted in a persistent labor force attachment gap between men and women. While women's labor force participation has increased dramatically over the past three decades,⁶⁰ only fifty percent of women actually negotiate full-time, year-round jobs together with family responsibilities.⁶¹ The extent of involvement in paid work is even less for women with children under six years old; only thirty-five percent of such women participate in the labor force on a full-time, year-round basis.⁶² Nearly three-fourths of part-time workers are women.⁶³ Women are more likely than men either to accept voluntarily or to be funneled into lower paying "mommy-track" professional jobs⁶⁴ and noncommissioned retail work.⁶⁵ "Contingent" workers⁶⁶—basically, workers with jobs that are not expected to last—are more likely than noncontingent workers to be women.⁶⁷ More than one-third of married mothers

59. *Id.*

60. Married women's labor force participation nearly doubled from 1969 to 1998, from forty-three percent to seventy-four percent. DOL REPORT ON THE AMERICAN WORKFORCE, *supra* note 11, at 96, 98 chart 3-22. The increase was even more dramatic for married women with children less than three years of age: twenty-three percent to sixty-three percent over the same period. *Id.* at 96, 98 chart 3-23.

61. See Philip N. Cohen & Suzanne M. Bianchi, *Marriage, Children, and Women's Employment: What Do We Know?*, MONTHLY LAB. REV., Dec. 1999, at 27 tbl.2, 30.

62. *Id.* at tbl.2.

63. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, SUMMARY 96-9, ISSUES IN LABOR STATISTICS: A DIFFERENT LOOK AT PART-TIME EMPLOYMENT (April 1996), available at <http://stats.bls.gov/opub/us/pdf/opbils05.pdf> [hereinafter BLS, PART-TIME EMPLOYMENT].

64. Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 89-90 (1989) [hereinafter Dowd, *Gender Paradox*].

65. This issue arose most clearly in *EEOC v. Sears*, 628 F. Supp. 1264, 1305-08 (N.D. Ill. 1986), in which Sears successfully argued as a defense to a Title VII discrimination case that its female employees voluntarily "chose" lower-paying, noncommissioned sales jobs. For discussions of the Sears case, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1752-54, 1802-05, 1840-41 (1990); Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 937-40 (1987) (book review).

66. Contingent work refers to a broad variety of jobs, including part-time, temporary, seasonal, leased, involuntarily self-employed, contract, and home-based workers. Anne E. Polivka & Thomas Nardone, *The Quality of Jobs: On the Definition of "Contingent Work"*, MONTHLY LAB. REV., Dec. 1989, at 9, 13.

67. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Contingent and Alternative Employment Arrangements, 3 (Dec. 21, 1999), available at <http://>

and nearly one-half of single mothers with children under age six do no market work.⁶⁸ In 1996, three out of four unemployed persons were women,⁶⁹ the majority, seventy percent, because of home or family responsibilities.⁷⁰

The persistent attachment gap resulting from women's disproportionate caregiving responsibilities at home has had tangible negative economic and social consequences for women. The part-time, temporary, or otherwise contingent jobs to which women are often limited generally provide lower hourly wages than full-time positions,⁷¹ tend to be less stable,⁷² and are less likely to offer health insurance,⁷³ childcare benefits,⁷⁴ pension

www.stats.bls.gov:80/news/release/conemp.nws.htm [hereinafter BLS, Contingent Employment].

68. Press Release, Bureau Labor Statistics, U.S. Dep't of Labor, Employment Characteristics of Families in 1997, tbl.4 (May 21, 1998), available at <http://stats.bls.gov/newsrels.htm>; see also Howard V. Hayghe, *Developments in Women's Labor Force Participation*, MONTHLY LAB. REV., Sept. 1997, at 41 (analyzing the changes in labor force participation rates for women between 1975 and 1996).

69. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, SUMMARY 98-4, ISSUES IN LABOR STATISTICS: WHO'S NOT WORKING 1 (May 1998), available at <http://stats.bls.gov/opub/us/pdf/ofbils19.pdf> [hereinafter BLS, WHO'S NOT WORKING].

70. *Id.*

71. See MICHAEL K. LETTAU, COMPENSATION IN PART-TIME JOBS VERSUS FULL-TIME JOBS: WHAT IF THE JOB IS THE SAME? 7 (Office of Research and Evaluation, Bureau of Labor Statistics, U.S. Dep't of Labor, Working Paper No. 260, 1994), available at <http://stats.bls.gov/ore/pdf/ec940080.pdf> (finding that compensation per hour is substantially lower for part-time jobs than for full-time jobs, even after taking account of differences in human capital between full-time and part-time workers); Jerome E. King, *Part-time Workers' Earnings: Some Comparisons*, BUREAU OF LABOR STATISTICS, COMPENSATION AND WORKING CONDITIONS, Summer 2000, at 31 (analyzing national data showing that, on average, part-time workers receive forty-seven percent of the total compensation of full-time workers); Stanley D. Nollen, *Negative Aspects of Temporary Employment*, 17 J. LAB. RES. 567, 569-70 (1996) (reporting that 1994 average hourly wages of temporary workers were thirty-five percent lower than wages of comparable full-time workers).

72. See SUSAN N. HOUSEMAN & ANNE E. POLIVKA, THE IMPLICATIONS OF FLEXIBLE STAFFING ARRANGEMENTS FOR JOB STABILITY 12-13 (Upjohn Institute Staff, Working Paper No. 99-056, 1999), available at <http://www.upjohninst.org/publications/wp/99-56.pdf> (finding that, except for independent contractors, workers in flexible staffing arrangements such as agency temporary and part-time workers have less job stability than those in regular full-time arrangements in the sense that they are more likely to switch employers, become unemployed, or involuntarily drop out of the labor force within a year).

73. Only one in five contingent workers has employer-provided health insurance, compared with more than one in two non-contingent workers. See BLS, Contingent Employment, *supra* note 67, at 4. Similarly, only about eighteen percent of part-time workers receive direct health insurance coverage from their employers, compared with about seventy percent of full-time workers. SHEILA R. ZEDLEWSKI, EXPANDING THE EMPLOYER-PROVIDED HEALTH INSURANCE SYSTEM: EFFECTS ON WORKERS AND THEIR EMPLOYEES 29-30, tbl.2-2 (1991); Donald R. Williams, *Women's Part-Time Employment: A Cross Flows Analysis*, MONTHLY LAB. REV., Apr. 1995, at 36, 43 n.8.

74. Non-contingent professional workers are fifteen times more likely than blue-collar or service workers to have benefits such as non-taxable childcare reimbursement accounts, employer funding for childcare, and on-site childcare. BUREAU OF LABOR STATISTICS, U.S.

benefits,⁷⁵ or opportunities for advancement.⁷⁶ Even for women who work full-time, career interruptions for nurturing responsibilities often translate into lower seniority, wages, and salaries *vis-à-vis* male coworkers.⁷⁷ Such interruptions occur not just during a woman's childbearing years, but later in life as well. Older women who reduce their work hours or exit the workforce at the height of their earning capacity to care for elderly parents experience not only short-term losses of wages, but also potentially long-term reductions in pension income.⁷⁸

Furthermore, women's disproportionate responsibility for caregiving at home has consequences well beyond their reduced economic well-being. The "feminization of poverty"⁷⁹ weakens women's bargaining power within marriage,⁸⁰ leaves women vulnerable to sexual abuse and domestic violence,⁸¹ and can decrease

DEPT. OF LABOR, SUMMARY 98-9, ISSUES IN LABOR STATISTICS: EMPLOYER-SPONSORED CHILDCARE BENEFITS (Aug. 1998), available at <http://stats.bls.gov/eb2/ebbar0030.pdf>.

75. Only about one-fifth of contingent workers are eligible for employer-provided pension plans, compared with nearly one-half of noncontingent workers. BLS, Contingent Employment, *supra* note 67, at 4.

76. See Anne E. Polivka, *A Profile of Contingent Workers*, MONTHLY LAB. REV., Oct. 1996, at 10 (defining contingent workers as individuals who do not have an explicit or implicit contract for ongoing employment). For more general discussions of the demographic characteristics and workplace disadvantages faced by contingent workers, see NONSTANDARD WORK: THE NATURE AND CHALLENGES OF CHANGING EMPLOYMENT RELATIONS (Françoise Carré et al. eds., 2000), and Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 565-70 (1996) (addressing the growing level of contract workers, temporary workers, and independent contractors in the current economy).

77. See Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, MONTHLY LAB. REV., Sept. 1995, at 18 (finding that the wages of women who have taken leave from the labor market never catch up to the wages of women who never left, even after as long as twenty years); Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. L. REV. 25, 33 & nn.38-41 (1999) (citing a study demonstrating that while the wage gap for single women has narrowed, the wage gap for mothers has persisted) [hereinafter Malin, *Fathers and Parental Leave Revisited*].

78. Pavalko & Artis, *supra* note 25, at 171 ("Interruptions that occur when women are closer to retirement may lower their Social Security or private pension benefits." (citing E.R. Kingston & R. O'Grady-LeShane, *The Effects of Caregiving on Women's Social Security Benefits*, 33 THE GERONTOLOGIST 230-39 (1993))).

79. The term "feminization of poverty" was first coined by Diana Pearce in 1978 based on her research which demonstrated a correlation between sex and poverty and the importance of sex in understanding poverty. Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, URB. & SOC. CHANGE REV., Vol. 11, 1978, at 28.

80. For a review of the literature on the relationship between wives' income and bargaining power within marriage, see Theodore Bergstrom, *Economics in a Family Way*, 34 J. ECON. LITERATURE 1903 (1996) and Shelly Lundberg & Robert A. Pollak, *Bargaining and Distribution in Marriage*, J. ECON. PERSP., Fall 1996, at 139.

81. Research shows a correlation between domestic violence and women's poverty. See CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 177-200 (2001) (presenting a variety of materials showing connections between poverty and domestic violence).

the likelihood of women gaining or keeping the custody of their children upon divorce.⁸² Moreover, because women are the primary caretakers of children in our society, the marginalization of women's wage work has resulted in the widespread poverty of children in America.⁸³ Finally, the failure of our law to recognize women's work/family conflicts has, in large part, shifted the burden of caregiving from one class of women to another—that is, from economically privileged women able to conform to the rigid expectations of the American workplace to low-paid domestic and childcare workers who disproportionately are poor women and women of color.⁸⁴ As demonstrated in Part II, the law's response to

82. This is particularly true when considerations of income are combined with powerful gender stereotypes. So, for example, even if the mother is a well-paid professional, a father's post-divorce ability to provide a substitute full-time mother to the children—through remarriage, family, or home-based childcare, for example—may seriously limit a mother's chances of gaining or retaining custody of children. For discussions of the effect of fathers' income and mothers' labor force participation on custody outcomes, see Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN L. REV. 2073, 2118–29 (1993); Joan Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. 249, 262–66 (1999); Cheri L. Wood, Comment, *Childless Mothers?—The New Catch-22: You Can't Have Your Kids and Work for Them Too*, 29 LOY. L.A. L. REV. 383, 407–11 (1995).

83. In 1997, 19.9% of children in the United States were poor. JOHN ICELAND ET AL., ARE CHILDREN WORSE OFF? EVALUATING CHILD WELL-BEING USING A NEW (AND IMPROVED) MEASURE OF POVERTY AS OF 1997 (U.S. Census Bureau, Poverty Measurement Working Papers, Apr. 1999), available at <http://www.census.gov/hhes/poverty/povmas/papes/iceland/john.html>. Children made up about forty percent of the poverty population, though only about a quarter of the total population. *Id.* The poverty rate for children in female-headed families was 49.0% in 1997. *Id.* Of those living in poverty in the United States, children outnumber every other age group. *Id.* For a review of the sociological literature addressing the trends and causes of childhood poverty in America, see Daniel T. Lichter, *Poverty and Inequality Among Children*, 23 ANN. REV. SOC. 121 (1997).

84. Sixty-one percent of children under age five are cared for by paid, non-relatives when their parents work or are in school. KRISTIN SMITH, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS 5 tbl.2 (U.S. Census Bureau, Current Pop. Rep., Oct. 2000). Such children spend an average of thirty-three hours per week in childcare. *Id.*

Ninety-six percent of private household workers, including childcare workers, cleaners, and servants, are women; almost one half, forty-seven percent, are black or Hispanic. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY: HOUSEHOLD DATA ANNUAL AVERAGES 180 tbl.11 (2000). In 1998, the median weekly earnings of such domestic workers were \$223, or approximately \$11,600 a year. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 2000–2001, at 357 (2000), available at <http://www.stats.bls.gov/ocohome.htm> [hereinafter OCCUPATIONAL OUTLOOK HANDBOOK 2000–2001]. About one-quarter of white, and one-third of black, domestic service workers live below the poverty level. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, A PROFILE OF THE WORKING POOR, 1997, at 9 tbl.4 (Aug. 1999). Non-private childcare providers, i.e., those that work in daycare centers, fare a little better, but not much: they earn about \$16,000 a year. See OCCUPATIONAL OUTLOOK HANDBOOK 2000–2001, *supra*, at 355.

For general discussions of these issues, see Glenn, *supra* note 46; Roberts, *supra* note 38; Peggie R. Smith, *Organizing the Unorganized: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 52–58 (2000); Peggie R. Smith, *Regulating Paid*

the labor force attachment gap and the resulting marginalized economic status of women and children has been minimal.

II. THE LIMITED RESPONSE OF EMPLOYMENT DISCRIMINATION LAW TO THE ATTACHMENT GAP: TITLE VII, THE PREGNANCY DISCRIMINATION ACT, AND THE FAMILY AND MEDICAL LEAVE ACT

A. History

For over a century, society expressed strong disapproval over, and the Supreme Court validated, the exclusion of women's presence in the workplace—particularly white, privileged women. Judicially enforced stereotypes of women as biologically and psychologically unsuited for participation in the paid labor force limited their employment-related constitutional claims.⁸⁵ Women who became destitute due to the loss or absence of their husbands were assured protection from wage labor by state "Mothers' Pensions"⁸⁶ and, after the Great Depression, by the Federal Aid to Dependent Children (ADC) program.⁸⁷ Inherent in these welfare programs was the assumption that women, particularly white, privileged women, should not work. As Sylvia Law has noted, "Women with children . . . were presumed unemployable because tradition [held] women to be physically and morally unsuited for wage labor, and because both law and social custom assign[ed] them the

Household Work: Class, Gender, Race, and Agendas of Reform, 48 AM. U. L. REV. 851, 918–24 (1999).

85. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding prohibition on employing women as bartenders unless they are the wives or daughters of male bar owners); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding hour caps for women employed in laundries); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding an Illinois law excluding women from the practice of law); cf. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding a California law that excluded pregnancy and childbirth from state disability insurance coverage). See generally Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CAL. L. REV. 1532 (1974) (reviewing the Supreme Court's stereotyped notions of women).

86. See Brenner, *supra* note 5, at 109.

87. ADC was one of several federal anti-poverty programs constituting the Social Security Act of 1935. See Social Security Act of 1935, ch. 531, tit. IV, § 401, 49 Stat. 627 (1935) (codified at scattered sections of 42 U.S.C.). ADC was renamed Aid to Families with Dependent Children (AFDC) in 1962, after Congress made families who were needy due to a father's unemployment, as opposed to only his death or absence, eligible for welfare. Social Security Act Amendments of 1962, Pub. L. No. 87-543, §§ 104(a)(3)(D), 156(b), 76 Stat. 172 (1962) (codified as amended at 42 U.S.C. § 606). Apparently, it was the presence of a father, not a mother, that qualified those receiving welfare for the label "family."

responsibility of caring for children.”⁸⁸ The well-documented exception was black women, who always engaged in wage work in large numbers, never had the luxury of receiving “protection” from the perceived harms of the labor force, and were excluded from government-sponsored welfare programs to ensure their availability for wage work.⁸⁹

This state of affairs remained largely undisturbed until the modern women’s movement of the 1960s and 1970s, when feminists came together to define and demand substantive changes in social, political, and economic institutions. Foremost among the changes achieved by feminism’s “second wave”⁹⁰ was the mass entrance of white, middle and upper-class women into the workplace, facilitated and secured by changes in the law. In 1964, Congress passed Title VII of the Civil Rights Act which prohibited, in part, employment discrimination on the basis of sex.⁹¹ Subsequently, successful Title VII and constitutional litigation advanced women’s opportunities to enter the workplace and professions in large numbers.⁹² By the early 1970s, the majority of mothers of school-age children were working outside of the home.⁹³ Since that time, women’s labor force participation has continued to increase dramatically, particularly for women with young children. For example, married women’s labor force participation nearly dou-

88. Law, *supra* note 5, at 1253.

89. See ABRAMOVITZ, REGULATING THE LIVES OF WOMEN, *supra* note 5, at 318–19, 325–27; JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT 7–8 (1985); MICHAEL B. KATZ, THE UNDESERVING POOR 145 n.44 (1989); JILL S. QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 21 (1994); ROBERTS, *supra* note 39, at 202–08.

90. The “first wave” consisted of the Women’s Joint Marital Property and Suffrage Movements of the nineteenth and early twentieth centuries. See generally Siegel, *supra* note 31 (recounting the history of the first women’s rights movement in America).

91. Mary Becker has presented a more complicated account of the common lore that sex was added to Title VII by conservative opponents of racial equality in a last ditch effort to defeat the bill. Compare Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166–67 (1971) (asserting that the original proponent of the measure was a southern congressman who voted against the Act), with Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 232 (1998) (asserting that “many women and men, eventually even the President, worked for and supported the inclusion of ‘sex’ [in Title VII]”).

92. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that the employer bears the burden of proving that denial of partnership was not based upon sex); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (holding that mandatory maternity leave requirement violates due process); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (stating that employers cannot discriminate against women with preschool age children when they hire men in the same category); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976) (prohibiting the exclusion of women from positions as “pursers” and different pay rates for female stewardesses and male pursers).

93. Brenner, *supra* note 5, at 115 n.71.

bled from 1969 to 1998.⁹⁴ The increase was even more pronounced for married women with children less than three years of age, increasing threefold over the same period.⁹⁵ Yet, because the demands of caring for children and other dependents within the family have decreased little for women, women's labor force participation has remained marginalized.⁹⁶

The law's response to the tension between women's work and family responsibilities has been minimal and slow. As the next section demonstrates, while Title VII facilitated the entrance of women into the labor force in large numbers, the model of formal equality and the categorical framework on which Title VII is based have made it difficult for women to gain workplace accommodations for their culturally based caregiving responsibilities under either a disparate treatment or disparate impact theory of discrimination. The result has been continuing job insecurity for women and the persistence of a significant labor force attachment gap between men and women.

B. Title VII

1. *Disparate Treatment Cases and the Sex-Plus Theory of Discrimination*—In a disparate treatment case, a woman must prove that an employer intentionally took some action because of her sex.⁹⁷ But women's caregiving is not absolute: not all women are caregivers. Men also perform some caregiving. Thus, given the categorical framework of Title VII, persuading a court that an employer who takes an adverse action against a woman on the basis of her competing family responsibilities is discriminating on the basis of her sex proves difficult. The first Title VII case ever to reach the Supreme Court addressed this precise issue. *Phillips v. Martin Marietta Corp.*⁹⁸ concerned a hiring policy that explicitly excluded women with preschool aged children, but not men who were similarly situated. In 1966, after Martin Marietta rejected Ida Phillips' application for the position of assembly trainee on the basis of this policy, she brought suit under Title VII, claiming sex discrimination.⁹⁹ Even though Martin Marietta demonstrated that more than

94. DOL REPORT ON THE AMERICAN WORKFORCE, *supra* note 11, at 96, 98 chart 3-22.

95. *Id.* at 96, 98 chart 3-23.

96. *See supra* Part I.

97. *See, e.g., Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-58 (1981).

98. 400 U.S. 542, 542-44 (1971).

99. *Id.* at 543.

three-fourths of those hired for the position of assembly trainee were women,¹⁰⁰ Phillips prevailed, and in a *per curiam* opinion, the Court outlined for the first time what has since come to be known as the "sex-plus" theory of discrimination.¹⁰¹ Under the sex-plus theory, employers may not treat female employees differently than their male coworkers on the basis of their sex "plus" some facially neutral characteristic, such as the fact that they have young children. Thus, after *Phillips*, a woman could conceivably make out a prima facie case of disparate treatment sex discrimination under Title VII on the basis of her caregiving responsibilities, even though all women are not primary caregivers or even caregivers at all.

However, the courts' narrow judicial interpretation of the sex-plus theory of discrimination has rendered the success of such a claim highly unlikely, perhaps explaining the paucity of reported sex-plus women's caregiving cases. Courts have found that sex-plus discrimination is a violation of Title VII only if the "plus," or facially neutral characteristic, is either a fundamental right or an immutable physical characteristic. The first court to articulate this narrow reading of *Phillips* was *Willingham v. Macon Telegraph Publishing Co.*¹⁰² In *Willingham*, the Fifth Circuit held that an employer's grooming code that required men but not women to wear their hair short did not violate Title VII, because physical appearance is mutable.¹⁰³ The court did concede, however, that discrimination on the basis of sex plus a mutable characteristic could constitute sex discrimination if the mutable characteristic were a "fundamental" right such as "the right to have children or to marry."¹⁰⁴ Reasoning that hair length is neither immutable nor a fundamental right, the court concluded that Macon Telegraph's policy did not violate Title VII.¹⁰⁵

Courts have applied *Willingham*'s test in a variety of contexts, but the mutability/fundamental rights dichotomy has produced highly inconsistent results. For example, while some courts have found airline weight requirements a violation of Title VII when applied

100. *Id.* Of course, these were women without young children.

101. The term "sex-plus" was introduced by Judge Brown of the Fifth Circuit in his dissent to the denial of a petition for rehearing en banc in *Phillips* before it reached the Supreme Court. *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257, 1260 (5th Cir. 1969). He said, "If 'sex plus' stands [as nondiscrimination under Title VII], the Act is dead." *Id.*

102. 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc).

103. *Id.*

104. *Id.*

105. *Id.* at 1091-92.

differently to women and men,¹⁰⁶ others have concluded that weight is mutable and thus fair game for employer regulation even if such rules purposefully target women.¹⁰⁷ Some courts have determined that employers who require their female but not male employees to wear "sexy" or feminine uniforms violate women's fundamental right to privacy;¹⁰⁸ still others have upheld uniform requirements as simply imposing professional or uniform standards of dress.¹⁰⁹ Most courts have struck down antiquated rules requiring women to quit their jobs once they marry,¹¹⁰ but not all have done so.¹¹¹ Before Congress passed the Pregnancy Discrimination Act,¹¹² discussed *infra*, women used the sex-plus theory of discrimination with only mixed results to challenge employment discrimination on the basis of pregnancy.¹¹³

In two separate decisions in 1974 and 1976, the Supreme Court held that disparate treatment on the basis of pregnancy did not constitute sex discrimination under the Fourteenth Amendment to the Constitution or under Title VII. In the 1974 opinion of

106. See, e.g., *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (en banc) (finding weight policy that applied only to stewardesses was unlawful sex discrimination); *Ass'n of Flight Attendants v. Ozark Air Lines*, 470 F. Supp. 1132 (N.D. Ill. 1979) (concluding plaintiff's showing that airline's policy imposed differing weight requirements on women and men was sufficient to defeat a summary judgment motion).

107. See, e.g., *Jarrell v. Eastern Airlines, Inc.*, 577 F.2d 869 (4th Cir. 1978) (affirming the district court's finding that weight requirement did not violate Title VII, because weight is a mutable characteristic fully within the employee's control). For an exhaustive review of the airline weight cases, see Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2561-63 (1994).

108. E.g., *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 600 (S.D.N.Y. 1981) (holding that employer requirement that female employee wear revealing uniform infringed upon her fundamental right to privacy and so constituted sex discrimination under Title VII's sex-plus theory).

109. E.g., *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1217 (8th Cir. 1985) (holding that an appearance code requiring female anchorwoman to dress in a feminine manner does not violate Title VII).

110. E.g., *Sprogis v. United Air Lines Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (holding that employer's policy of terminating female, but not male, flight attendants upon marriage violates Title VII); *Jurinko v. Edwin L. Wiegand Co.*, 331 F. Supp. 1184, 1187-88 (W.D. Pa. 1971) (holding that refusal to hire married women but not men violates Title VII).

111. E.g., *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, 893 (5th Cir. 1977) (finding no sex-plus discrimination if the no-marriage rule applies equally to men).

112. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at § 42 U.S.C. § 2000e(k) (1994)).

113. Compare, e.g., *Cohen v. Chesterfield Sch. Bd.*, No. 71-1707, 1972 WL 2594 (4th Cir. Sept. 14, 1972) (noting in dictum that mandatory maternity leave requirement for school teachers violates Title VII, because only women become pregnant) (decided on constitutional grounds) and *Harper v. Thiokol Chemical Corp.*, 619 F.2d 489 (5th Cir. 1980) (holding that under decisions precluding sex-plus discrimination, employer may not lawfully single out for discriminatory treatment women returning from pregnancy leave who have failed to sustain a normal menstrual cycle), with *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (upholding under Title VII employee disability plan that excluded pregnancy).

Geduldig v. Aiello,¹¹⁴ the Supreme Court held that discrimination on the basis of pregnancy was not sex discrimination under the equal protection clause of the Fourteenth Amendment. *Geduldig* addressed a California state disability insurance program that denied benefits for normal pregnancy.¹¹⁵ Reasoning that the program did not treat women differently from men, but only differentiated pregnant and "nonpregnant persons,"¹¹⁶ the Court found no discrimination on the basis of sex.¹¹⁷ In 1976, the Court extended *Geduldig*'s reasoning to Title VII in the case of *General Electric Co. v. Gilbert*.¹¹⁸ While the *Gilbert* decision did not explicitly mention the sex-plus theory of discrimination, the reasoning represented a rejection of the theory, even with regard to pregnancy.

a. *The Pregnancy Discrimination Act*—Soon after *Gilbert*, a coalition of feminist activists, labor unions, and civil rights groups came together to reverse the decision legislatively.¹¹⁹ The congressional response was swift: in 1978, Congress adopted the Pregnancy Discrimination Act ("PDA"),¹²⁰ which amended the definitions section of Title VII to include pregnancy in its definition of sex.¹²¹ Subsequently, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,¹²² the Supreme Court acknowledged that *Gilbert* had been superseded by the PDA and held that an employer could no longer deny insur-

114. 417 U.S. 484 (1974).

115. The statute provided, in relevant part: "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." *Id.* at 489 (quoting CAL. UNEMP. INS. CODE § 2626). Because a California state court had previously ruled that this provision did not bar benefits for disability related to medical complications arising during pregnancy, only normal pregnancy was at issue in *Geduldig*. *See id.* at 490-92; *see also* *Rentzer v. Cal. Unemployment Ins. Appeals Bd.*, 108 Cal. Rptr. 336, 338 (Cal. Ct. App. 1973).

116. *Geduldig*, 417 U.S. at 497 n.20.

117. *Id.* at 502.

118. 429 U.S. 125 (1976).

119. *See* Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed*, 77 CAL. L. REV. 171, 187 (1989).

120. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1994)).

121. The pertinent language reads:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

42 U.S.C. § 2000e(k) (1994).

122. 462 U.S. 669, 670, 684 (1983).

ance coverage for pregnancy if it provides employees with an otherwise comprehensive health insurance plan.

The Pregnancy Discrimination Act reconnected sex and pregnancy so as to make the sex-plus theory unnecessary in pregnancy discrimination cases. Effectively, the PDA reclassified pregnancy, childbirth, and "related medical conditions"¹²³—which the Court previously had considered to be neutral "plus" factors constituting legitimate bases for employment discrimination—as discriminatory "sex" factors *per se*.¹²⁴ Subsequently, courts have dismissed sex-plus pregnancy claims as duplicative where the plaintiff also pleads a PDA claim.¹²⁵ The PDA allows a court to find that a plaintiff whose employer discriminates against her on the basis of pregnancy has made out a *prima facie* case of sex discrimination under Title VII without subjecting her to the vagaries of the sex-plus theory of discrimination.

The PDA has had a significant impact on the perception of women as wage earners. This change is highlighted by memories of a not so distant time when a pregnant woman, once she began to "show," was simply given a going away party and departed from the workplace as a matter of course.¹²⁶ Moreover, the PDA has overcome the obstacle of categorization in the area of pregnancy which the sex-plus theory articulated in *Phillips* had unsuccessfully addressed.¹²⁷ However, narrow judicial interpretation of the PDA has limited the Act's protection of pregnant women from discrimination in the workplace, whether defined simply as the right to nondiscrimination or to substantive employment benefits that will put women on an equal footing with men.

Under the PDA, women are entitled to disability or other leave for pregnancy only to the extent that such leave is available to other employees for medical disabilities unrelated to pregnancy. Put simply, "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."¹²⁸ Thus, if an employer or a state-sponsored insurance scheme does not offer any disability leave, even pregnant women receive no protection under the PDA.¹²⁹ Some states have enacted legislation

123. 42 U.S.C. § 2000e(k).

124. *Newport News*, 462 U.S. at 684 (asserting that under the PDA "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex").

125. *E.g.*, *Brennan v. Nat'l Tel. Directory Corp.*, 881 F. Supp. 986, 996 (E.D. Pa. 1995).

126. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 233, 302 (1982).

127. *See supra* notes 113–24 and accompanying text.

128. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

129. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285–86 (1987) (holding that the PDA requires pregnancy leave only to the same extent that such leave is also offered for

that goes beyond the PDA to guarantee pregnancy leave to women whether or not an employer offers disability or sick leave, and the Court has upheld such laws in the face of employer challenges contending that they are preempted by Title VII's statutory scheme.¹³⁰ But these states are few and far between,¹³¹ and those that do offer affirmative protections for pregnancy significantly limit the circumstances in which employees are entitled to job guarantees.¹³²

Outside the pregnancy leave context, plaintiffs have been successful in the rare instances where direct evidence of pregnancy discrimination is available. For example, in *Sheehan v. Donlen Corp.*,¹³³ a manager's comments such as "Oh, my God, she's pregnant again" and "You're not coming back after this baby" constituted sufficient direct evidence of pregnancy discrimination to support a woman's Title VII PDA claim. But such overt discrimination is rare. Unlike this example and the early pregnancy leave cases, the typical case today involves circumstantial evidence of discrimination. Successfully litigating such a case often requires comparative evidence which, given the absence of similarly situ-

non-pregnancy related disabilities); cf. *Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511, 513-14 (1987) (holding that Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3304(a) (12), permits states to disqualify from eligibility for unemployment compensation workers who voluntarily quit their jobs due to pregnancy, so long as states similarly exclude all workers who terminate their employment for non-work related reasons).

130. *Cal. Fed.*, 479 U.S. at 292. In *Cal. Fed.*, the Court upheld, in the face of an employer's challenge, a California state law granting pregnant women job security not available to other workers, holding that the PDA did not preempt such positive action laws. *Id.* at 287. Still, the Court agreed that the PDA only requires pregnancy leave to the same extent that such leave is also offered for non-pregnancy related disabilities. *Id.* at 284. Thus, California's law survived a preemption challenge under the PDA, not because the Court believed the PDA provided women with protection beyond that provided to men, but because "Congress intended the PDA to be 'a floor . . . not a ceiling.'" *Id.* at 285; see also *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 479 U.S. 1050 (1987) (upholding similar Montana law on like grounds). In neither decision did the Court address the question of whether state laws mandating leave only for women would violate the equal protection clause. The constitutional issue was not presented in *Cal. Fed.*, and, while raised in *Miller-Wohl*, the Court did not reach it, instead peremptorily remanding the case in light of its decision in *Cal. Fed.*

131. Before the FMLA was passed, of the thirty-four states that had some type of family leave laws in place, only twelve states and the District of Columbia required employers to provide job-protected maternity leave. Jane Waldfogel, *Family Leave Coverage in the 1990s*, MONTHLY LAB. REV., Oct. 1999, at 13. Since the passage of the Act, no significant new state legislation has been enacted. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 766 n.217 (2000).

132. Mark R. Brown, *A Case for Pregnancy-Based Unemployment Insurance*, 29 U. MICH. J.L. REFORM 41, 44-54 (1995-96) (surveying state unemployment insurance, temporary disability, and pregnancy leave laws and detailing their limitations); Donna R. Lenhoff & Sylvia M. Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 HARV. J. ON LEGIS. 403, 410-12 (1989) (surveying state pregnancy leave provisions and detailing their limitations).

133. 173 F.3d 1039, 1042 (7th Cir. 1999).

ated male employees, can create insurmountable problems of proof.¹³⁴ Moreover, even where there is such direct evidence of discrimination, the Supreme Court has held that if the employer's adverse action is based upon both permissible factors and a plaintiff's sex, such comments do not necessarily show discriminatory motive unless they are made at the moment of the adverse employment decision.¹³⁵ Because such remarks are rarely made when a decision maker is exercising formal authority,¹³⁶ this requirement has limited the protections of the PDA even in instances where there is direct evidence of discrimination.¹³⁷ Further limiting the protections of the PDA has been courts' uncritical acceptance of Title VII's "position elimination defense," enabling employers to claim that a pregnant woman was dismissed due to elimination of her position during her absence or downsizing, not to her use of pregnancy leave.¹³⁸

134. See, e.g., *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1155 (7th Cir. 1997) (finding that because there was no other part-time employee besides plaintiff, she could not show she was treated less favorably than similarly-situated, non-pregnant employees); *Barrash v. Bowen*, 846 F.2d 927, 931-32 (4th Cir. 1988) ("One can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies."). For a general discussion of the special problems of comparative proof in the context of pregnancy discrimination cases, see Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 243-47 (1998).

135. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989).

136. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1213 (1995) (summarizing an extensive review of cognitive psychology literature showing that intergroup bias usually occurs long before the moment of decision, since normal decision making is a multi-stage process which includes perception, interpretation, attribution, memory, and judgment); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339-44 (1987) (drawing on Freudian psychological theory to argue that prejudice is typically repressed and thus more likely to slip out when a person is not consciously self-aware of her thought process).

137. E.g., *Geier v. Medtronic, Inc.*, 99 F.3d 238, 242 (7th Cir. 1996) (holding that a supervisor's comments in January and October 1991 warning the plaintiff that she had better not get pregnant during the employer's busy season and threatening to fire her if she did not immediately return to work after a miscarriage were not sufficiently causally linked to her termination in early 1992 to prove discriminatory motive, even though she was fired just two weeks after she informed her employer she was pregnant).

138. See, e.g., *Ilhardt*, 118 F.3d at 1155-56; *Rhett v. Carnegie Ctr. Assoc.*, 129 F.3d 290, 297 (3d Cir. 1997); *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 422-23 (1st Cir. 1996); *Pearlstein v. Staten Island Univ. Hosp.*, 886 F. Supp. 260, 267 (E.D.N.Y. 1995). But see *Atchley v. Nordam Group, Inc.*, 180 F.3d 1143, 1149 (10th Cir. 1999) (holding that elimination of plaintiff's position due to company "restructuring" while she was on maternity leave constituted violation of Title VII). On the interplay between Title VII's position elimination defense and pregnancy discrimination, see Victoria R. Riede, Comment, *Employer Discrimination on the Basis of Pregnancy: Righting the Power Imbalance*, 27 GOLDEN GATE U. L. REV. 223 (1997).

Most significantly, the PDA does not address the issue of women's family caregiving beyond the immediate, physical events of pregnancy and childbirth. This fact was made clear in *Maganuco v. Leyden Community High School District 212*.¹³⁹ In that case, Rebecca Maganuco, a schoolteacher, presented a PDA challenge to a leave policy that would not allow her to combine a period of paid sick leave and unpaid maternity leave in order to extend her leave from work following the birth of her child.¹⁴⁰ While the school district policy provided for both kinds of leave, it required her to choose between them.¹⁴¹ The Seventh Circuit rejected Maganuco's claim on the ground that the PDA "is limited to policies which impact or treat medical conditions relating to *pregnancy* and *childbirth* less favorably than other disabilities."¹⁴² Because Maganuco sought time off from work to nurture and parent her newborn child, rather than to deal with a physical disability relating to pregnancy or childbirth, the court held that her claim was not cognizable under the PDA.¹⁴³

Similarly, the case of *McNill v. New York City Department of Correction*¹⁴⁴ illustrates the narrow definition that courts have accorded pregnancy under the PDA. Michele McNill, a New York City corrections officer, experienced a difficult pregnancy. Because of complications in her first trimester, she was confined to bed rest on the advice of her physician for nearly her entire pregnancy.¹⁴⁵ Her son was born with a cleft palate, a congenital birth defect requiring surgery.¹⁴⁶ Because of his disability, McNill's son needed to be breast-fed until he was old enough to undergo corrective surgery.¹⁴⁷ In order to care for her son—literally to sustain his life—McNill thus continued to remain absent from work to breast-feed her son.¹⁴⁸ When she was finally able to return to work after her son's surgery, she was placed on probation for excessive absenteeism, not because of her "medical" absence during her difficult pregnancy, but because of her post-delivery absence in order to breast-feed.¹⁴⁹ As an employee on probation, McNill became ineligible for certain discretionary benefits, including a regular work

139. 939 F.2d 440 (7th Cir. 1991).

140. *Id.* at 443–45.

141. *Id.*

142. *Id.* at 444 (emphasis added).

143. *Id.* at 444–45.

144. 950 F. Supp. 564 (S.D.N.Y. 1996).

145. *Id.* at 566.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 567.

schedule,¹⁵⁰ clearly an important benefit for a new mother. In finding that the PDA did not protect McNill from her employer's adverse action, the court reasoned: "The dictionary defines 'pregnancy' as 'the period during which a developing fetus is carried within the uterus.' Childbirth is defined as 'parturition,' '[t]he act of giving birth.'"¹⁵¹ In contrast to these physical conditions, McNill's decision to nurse her son was a choice: "[I]f a woman wants to stay home to take care of the child, no benefits must be paid because this is not a medically determined condition related to pregnancy."¹⁵²

These are just a few examples, but courts addressing similar situations have uniformly held that needs or conditions of a child that require a mother's presence are not within the scope of the PDA. Thus, for example, courts have held that women whose employers terminate, demote, or otherwise discipline them because of their need for workplace accommodations or time off to breast feed,¹⁵³ provide medical care to,¹⁵⁴ adopt,¹⁵⁵ or simply "rear"¹⁵⁶ their children are not protected by the PDA.¹⁵⁷ In sum, while the PDA has had a significant impact on the perception of women as wage earners, and has overcome the obstacle of categorization in the area of pregnancy which the sex-plus theory had unsuccessfully

150. *Id.*

151. *Id.* at 569 (citations to Webster's Dictionary omitted).

152. *Id.* at 570 (citing H.R. REP. NO. 95-948, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.A.N. 4749, 4753 (legislative history of PDA)).

153. *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999) (holding that Title VII and the PDA do not cover breast feeding because it is not a medical condition related to pregnancy or childbirth); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (holding that employer's refusal to provide employee with part-time schedule for breast-feeding or child-rearing is not conduct prohibited by Title VII, because "[n]othing in the PDA, or Title VII itself, obliges an employer to accommodate the child-care concerns of breast-feeding workers"); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990) ("While it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not 'medical conditions' related thereto."), *aff'd without opinion*, 951 F.2d 351 (6th Cir. 1991).

154. *Barnes v. Hewlett-Packard Co.*, 846 F. Supp. 442, 443-45 (D. Md. 1994) (holding that PDA does not cover leave to provide medical care for newborn twins).

155. *Pearlstein v. Staten Island Univ. Hosp.*, 886 F. Supp. 260, 266 n.5 (E.D.N.Y. 1995) (holding that plaintiff who took leave to adopt child is unprotected by PDA).

156. *Piantanida v. Wyman Ctr., Inc.*, 927 F. Supp. 1226, 1238 (E.D. Mo. 1996), *aff'd*, 116 F.3d 340 (8th Cir. 1997) (denying relief to woman who was demoted while on maternity leave by reason that "new mother[s]" are not a protected class under the PDA); *Record v. Mill Neck Manor Lutheran Sch. for the Deaf*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (holding that Title VII does not protect people terminated because they wish to take child-rearing leaves, as opposed to women who wish to take pregnancy leaves).

157. For two articles providing a more extensive review of cases demonstrating the limited judicial interpretation of the PDA, see Greenberg, *supra* note 134, at 228-47 and Jendi B. Reiter, *Accommodating Pregnancy and Breastfeeding in the Workplace: Beyond the Civil Rights Paradigm*, 9 TEX. J. WOMEN & L. 1, 6-13 (1999).

addressed, it has not countered the limits of formal equality theory on which both Title VII and the PDA are based.

b. Salvaging Title VII's Sex-Plus Theory of Discrimination After the PDA: Is Sex-Plus Good for Anything?—Given the limited scope of the PDA, Title VII's sex-plus theory of discrimination remains as one of the primary tools with which women are left to combat disparate treatment in the workplace on the basis of their family caregiving responsibilities. After all, the PDA was merely intended to carve out pregnancy from the sex-plus theory so as to make discrimination on the basis of pregnancy *per se* sex discrimination; it was not intended to eliminate the sex-plus theory *in toto*. However, as this section demonstrates, the sex-plus theory offers little more to women than the PDA. Employment discrimination on the basis of pregnancy and childbirth—essentially women's biological difference—has become the outer limit to which employers can typically be held liable.¹⁵⁸

Narrow judicial interpretation of the sex-plus theory of discrimination as limited to those situations where the neutral “plus” factor is either an immutable characteristic or a fundamental right has rendered the success of sex-plus caregiving claims highly unlikely.¹⁵⁹ First, given prevailing societal conceptions of women's caregiving as a product of either freely determined choice or perhaps gender socialization, but certainly not biology, it should not be surprising that there are no reported cases where the plaintiff has argued or a court has found that a woman's status as a primary caregiver is an immutable characteristic under Title VII's sex-plus theory. Further, while commentators and courts often have cited *Phillips v. Martin Marietta Corp.*¹⁶⁰ for the proposition that “having children” is a fundamental right,¹⁶¹ no court ever has translated this fundamental right to “have” children into a fundamental right to receive workplace accommodations to care for them. At best, the

158. It should be noted that there is a paucity of reported decisions addressing whether a woman whose employer discriminates against her on the basis of her cultural caregiving unrelated to pregnancy constitutes discrimination under the sex-plus theory. There are two possible reasons for this state of affairs. Narrow judicial interpretation accorded the sex-plus theory has limited its value to plaintiffs, and advocates for women are ambivalent, in any case, about pushing a theory that emphasizes women's cultural differences for fear of reinforcing harmful gender roles.

159. See *supra* notes 102–18 and accompanying text.

160. 400 U.S. 542 (1971).

161. E.g., *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc); Keven H. Friedman & Christine R. Mertz, Note, ‘Borderline’ Sexual Harassment: A Study of Sex Based Discrimination in the United States and Argentina and the Problem of Extraterritorial Application of U.S. Law, 15 HOFSTRA LAB. & EMP. L.J. 569, 578 (1998) (“[I]n *Phillips v. Martin Marietta* . . . having children was the fundamental right protected.”).

Court's decision in *Phillips* and the sex-plus theory of discrimination give women the right both to "have" children and work within the existing androcentric structure of the workplace. This achievement should not be taken lightly. In part, Title VII decisions such as *Phillips* facilitated women's entrance into the paid workforce in large numbers.¹⁶² However, Title VII's utility as a tool to restructure the workplace now that women have arrived has proved inadequate, at best.

Revisiting the facts in *Phillips* illustrates this limitation. Phillips was not seeking employment from Martin Marietta with an accommodation for her childcare responsibilities, though, like most women with young children, she probably could have benefited from one. Rather, she was simply seeking to obtain a position on the same terms and conditions as male applicants. The evil that the Court aimed to address in *Phillips* was Martin Marietta's allegedly stereotypical assumption that Phillips would be absent from work more frequently than her male or childless female coworkers.¹⁶³ As Justice Marshall noted in his concurring opinion, "By adding the prohibition against job discrimination based on sex . . . Congress intended to prevent employers from refusing 'to hire an individual based on *stereotyped* characterizations of the sexes.'"¹⁶⁴ But, what if women's experiences bore out the stereotype? What if Phillips, like many women with young children, would require some accommodation such as a flexible work schedule or periodic absences from work to avoid the "second shift"¹⁶⁵ at home or the delegation of her family responsibilities to a relatively disadvantaged domestic caregiver? Given the model of formal equality on which Title VII is based, such accommodations are not attainable. Thus, plaintiffs have

162. See, e.g., *In re Consol. Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1145 (7th Cir. 1978) (holding that a policy requiring female, but not male, cabin attendants with children to accept ground duty positions was "a clear example of sex discrimination" under Title VII), *rev'd on other grounds sub nom.* *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

163. Cf. *In re Consol. Pretrial Proceedings*, 582 F.2d at 1145-46 (defendant airline attempts to justify no-motherhood policy on ground that mothers, but not fathers, of young children would have an unacceptably high rate of absenteeism).

164. *Phillips*, 400 U.S. at 545 (Marshall, J., concurring) (emphasis added) (footnote omitted).

165. The "second shift," first identified as such by Arlie Hochschild in her book by the same name, refers to the housework and caregiving responsibilities for which women still remain largely responsible, despite the dramatic increase in their labor force participation over the past three decades. HOCHSCHILD, *supra* note 24, at 2-4. Calling women's unpaid family work a "shift" was part of the larger feminist project of exposing women's caregiving as work deserving of recognition and compensation. See *supra* notes 31-35 and accompanying text.

been moderately successful in sex-plus employment discrimination cases like *Phillips* concerning hiring or promotion, where, absent any employment record, or at least any employment record for the job in question in the case of promotion, the perceived threat of a woman's family caregiving responsibilities can be dismissed as a stereotype.¹⁶⁶ In contrast, plaintiffs have been far less successful in sex-plus discrimination cases concerning demotion or termination, where either the plaintiff's direct requests or her employment record reveals that she requires an accommodation for her family obligations.¹⁶⁷ In sum, where plaintiffs have attempted to use Title VII to gain accommodations for their cultural caregiving work, they have been largely unsuccessful. The stories of four women presented in *Chi v. Age Group, Ltd.*,¹⁶⁸ *Martinez v. NBC*,¹⁶⁹ *Fuller v. GTE Corp.*,¹⁷⁰ and *Bass v. Chemical Banking Corp.*¹⁷¹ illustrate this phenomenon.

i. *Teresa Fong Chi*—Teresa Fong Chi held a position as an import coordinator with Age Group, a garment importer.¹⁷² Age Group required Chi to work overtime on a regular basis.¹⁷³ Chi became pregnant and took an approved ten-week maternity leave after her child was born.¹⁷⁴ As the expiration of her leave grew near, Chi notified Age Group that she wished to return to work on a four-day a week basis and that she would not be able to resume her pre-maternity leave schedule of working regular overtime.¹⁷⁵ When her supervisor informed her this would not be possible, Chi agreed to return on a full-time basis, but persisted in her request

166. See *Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 727 & n.2 (8th Cir. 1982) (holding that school district's failure to promote female teacher based on the stereotypical presumption that her childcare responsibilities would necessarily interfere with her job performance violates Title VII); *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205 (MBM), 1998 WL 912101, at *7 (S.D.N.Y. Dec. 30, 1998) (holding that law firm's failure to promote plaintiff with "consistently excellent employment evaluations" to managerial position, instead offering the position to less qualified men with children and women without children, established prima facie case of sex-plus discrimination under Title VII); *Carter v. Shop Rite Foods, Inc.*, 470 F. Supp. 1150, 1167-68 (N.D. Tex. 1979) (holding that employer's failure to promote female grocery store employees to managerial positions, *inter alia*, because their childcare responsibilities allegedly would prevent them from "taking on longer hours," violates Title VII).

167. See discussion *infra* Part II.B.1.b.i.

168. No. 94 Civ. 5253 (AGS), 1996 WL 627580 (S.D.N.Y. Oct. 29, 1996).

169. 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

170. 926 F. Supp. 653, 656 (M.D. Tenn. 1996).

171. No. 94 Civ. 8833 (SHS), 1996 WL 374151 (S.D.N.Y. July 2, 1996).

172. *Chi*, 1996 WL 627580, at *1.

173. *Id.* at *2.

174. *Id.*

175. *Id.*

to work regular hours.¹⁷⁶ Ultimately, Age Group deemed Chi unqualified to return to work because of her unwillingness to work long hours and fired her.¹⁷⁷ Chi filed suit, alleging that Age Group discriminated against her on the basis of her sex and her "status of a mother with child" in violation of Title VII and the New York Human Rights Law.¹⁷⁸ Applying the three-step burden-shifting framework first articulated in *McDonnell Douglas Corp. v. Green*,¹⁷⁹ the court ruled that Chi had failed to make out a prima facie case of sex discrimination, even in light of the sex-plus theory.¹⁸⁰

The Supreme Court developed the *McDonnell Douglas* burden-shifting framework in recognition of the fact that few employers explicitly discriminate on the basis of sex as did Martin Marietta in 1966, thereby making it particularly difficult to prove intent in employment-related disputes.¹⁸¹ According to the *McDonnell Douglas* framework, to establish a prima facie case the plaintiff need only show that: (1) she is a member of a protected class; (2) she was qualified for the position;¹⁸² (3) her employment was

176. *Id.*

177. *Id.*

178. *Id.* at *4-6. Because Chi had not exhausted her administrative remedies as required by Title VII, 42 U.S.C. §§ 2000e-5(e), (f)(1), the court dismissed her Title VII claim. *Id.* at *5. However, the court considered her claims under the New York Human Rights law applying the "standards . . . established by the United States Supreme Court for . . . Title VII." *Id.* (quoting *Sogg v. Am. Airlines*, 603 N.Y.S.2d 21, 23 (1993)).

179. 411 U.S. 792 (1973).

180. *Chi*, 1996 WL 627580, at *5-6.

181. The *McDonnell Douglas* opinion itself is conspicuously silent as to the Court's intention in adopting the now famous burden-shifting test; such formal acknowledgments did not come until later. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) ("[T]he McDonnell Douglas Formula does not require direct proof of discrimination . . ."); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993) ("Because 'Title VII tolerates no racial discrimination, subtle or otherwise,' we devised a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence.") (Souter, J., dissenting); *Patterson v. McLean Credit Union*, 491 U.S. 164, 215 (1989) ("[A] well-established framework of proof applies if the plaintiff offers only indirect evidence of discriminatory motive."); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 670 (1989) ("[I]n the . . . event that intent has to be established by inference, the employee may resort to the McDonnell/Burdine inquiry."); *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.") (quoting *Loeb v. Textrom, Inc.* 600 F.2d 1003, 1014 (1st Cir. 1979)); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Bd. of Educ. of City Sch. Dist. of New York v. Harris*, 444 U.S. 130, 162 n.10 (1979) ("[D]irect proof of an illicit motive is often unavailable . . .").

182. In cases of demotion and termination, some courts have interpreted this prong as requiring a showing of "satisfactory work performance" or that the employee was satisfactorily meeting the legitimate expectations of her employer. *E.g.*, *Warfield v. Lebanon Corr. Inst.*, 181 F.3d 723, 729 (6th Cir. 1999); *Oates v. Discovery Zone*, 116 F.3d 1161, 1171 (7th Cir. 1997); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996).

terminated or she was not promoted; and (4) the discharge or failure to promote occurred under circumstances giving rise to an inference of unlawful discrimination based on her membership in the protected class.¹⁸³

The court found Chi to be a member of a protected class under a sex-plus theory of discrimination, thereby satisfying part one of the *McDonnell Douglas* test for making out a prima facie case.¹⁸⁴ However, because Chi “was not willing to work late on a regular basis,” the court found that “Chi has not shown that she was qualified for the position, which required her to stay late when needed to communicate with Age Group’s Far East manufacturers.”¹⁸⁵ Thus, although the burden on the plaintiff to establish a prima facie case under the *McDonnell Douglas* framework is “not onerous,”¹⁸⁶ the court found that Chi failed to meet the requirement of the second prong of the *McDonnell Douglas* test that she must be “qualified for her position.”¹⁸⁷ The court did not consider the possibility that Age Group might work out a flexible schedule with Chi, allowing her, for example, to shift her work hours to more closely correspond with the business hours of Age Group’s Far East exporters. Under Title VII’s model of formal equality, even as

183. *E.g., Hicks*, 509 U.S. at 506–08; *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *McDonnell Douglas*, 411 U.S. at 802. Once the plaintiff establishes a prima facie case, the defendant employer must come forward with evidence to support a legitimate non-discriminatory reason for its actions. *Hicks*, 509 U.S. at 506–07. If the employer carries this burden of production, “the presumption raised by the prima facie case is rebutted” and “drops from the case.” *Id.* at 507 (quoting *Burdine*, 450 U.S. at 255 & n.10). The plaintiff then has the burden of showing that the proffered reason is merely a pretext to mask purposeful employment discrimination. *Id.* at 507–08. Such a showing of pretext, along with the plaintiff’s prima facie case, may be sufficient to sustain a finding of intentional discrimination. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 146–47 (2000).

184. *Chi*, 1996 WL 627580, at *6.

185. *Id.* at *5.

186. *Burdine*, 450 U.S. at 253.

187. *Chi*, 1996 WL 627580, at *5. It is apparent that the *Chi* case was not litigated well. While it appears that Chi was represented by counsel, her request for over a billion dollars in damages, laundry list of claims, and failure to submit a separate statement of contested material facts in response to defendant’s summary judgment motion in accordance with the local rule gives the case a distinct pro se flavor. *Id.* at *1. But these failings, as frustrating as the court may have found them, are irrelevant to the question of whether Chi had sustained a prima facie case, to which a substantial portion of the opinion is addressed. The court’s repeated references to Chi’s deposition testimony, submitted by defendants, in its analysis of her prima facie case were thus clearly erroneous, and evidence its hostility toward Chi and the very concept of her claim. *Id.* at *2 (derisively quoting Chi’s statements that she was “treated like a dog,” that Age Group made her stay late for “some stupid reason,” that “it’s always difficult for people with family to stay that late,” and that Age Group terminated her based on her “status as being married with child.”). The court’s use of such references are particularly insensitive given that English, in all likelihood, was not Chi’s first language. *See id.* at *6 (noting that Chi learned about her position at Age group from an advertisement in a Chinese language newspaper).

modified by the sex-plus theory of discrimination, such accommodations are inconceivable. Because Title VII provides women nothing more than the right to participate in the workplace on the same terms as men,¹⁸⁸ it is of little value to women like Teresa Chi who seek affirmative accommodations for their caregiving responsibilities.

ii. *Alicia Martinez*—Alicia Martinez was an associate producer at “MSNBC,” a 24-hour-a-day, all-news cable television network.¹⁸⁹ Martinez told MSNBC that she was pregnant before she accepted the position.¹⁹⁰ After returning from maternity leave, Martinez brought an electric breast pump to work and with MSNBC’s consent, took three, twenty-minute breaks per day to pump her breast milk so that she could breast feed her son while resuming her career.¹⁹¹ On several occasions, Martinez suffered intrusions by other employees into the locked, empty “edit” room which she was using to pump her milk, as well as offensive comments regarding her breast pumping by a male coworker.¹⁹² Martinez also contended that her supervisor began imposing onerous schedule changes, exacerbating her existing difficulties juggling the overtime demands of her position as a producer and caring for her infant son.¹⁹³ Martinez asked for a more regular work schedule, but MSNBC denied her request unless she would agree to accept a demotion, salary cut, and Tuesday through Saturday schedule.¹⁹⁴ In response, Martinez informed MSNBC that she would be looking for other employment, but that she wished to remain in her current position as a producer until her departure.¹⁹⁵ Subsequently, MSNBC demoted Martinez anyway because she failed to work sufficient overtime during a period of particularly heavy media coverage surrounding the deaths of Princess Diana and Mother Teresa.¹⁹⁶ Three months later, Martinez resigned, ultimately taking a part-time position at CBS.¹⁹⁷

188. Use of the word “men” here is consistent with the empirical research set out in Part I, which demonstrates that, by all measures, women continue to perform the bulk of family caregiving and housework. *See supra* Part I.

189. 49 F. Supp. 2d at 306 (S.D.N.Y. 1999).

190. *Id.*

191. *Id.* at 307.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* Of course, this is quite ironic given that the mass adoration of Princess Diana and Mother Teresa is attributable to their selfless dedication to the care of others.

197. *Id.* at 308.

Martinez filed suit, alleging that MSNBC discriminated against her on the basis of her sex plus her need to pump breast milk in violation of Title VII.¹⁹⁸ Despite the fact that Martinez presented credible circumstantial evidence of sex discrimination, as evidenced by her supervisor's imposition of onerous schedule changes upon her return from maternity leave and tasteless and offensive remarks directed at the fact that she was pumping breast milk, the court did not provide Martinez with an opportunity to demonstrate that she met the *McDonnell Douglas* burden-shifting test for proving intentional discrimination with circumstantial evidence.¹⁹⁹ Rather, the court declared that because "men are physiologically incapable of pumping breast milk," Martinez had failed to make out a prima facie case of sex discrimination, even when considered under the theory of sex-plus discrimination.²⁰⁰ The *Martinez* court acknowledged "the problems facing women who wish to bear children while pursuing challenging careers," but disagreed with Justice Stevens' opinion that Title VII provides sufficient basis for the judicial protection of qualities unique to women, concluding "if breast pumping is to be afforded protected status, it is Congress alone that may do so."²⁰¹

The court's reasoning in *Martinez*, as in *Chi*, demonstrates the limitations of the sex-plus theory of discrimination in overcoming societal and judicial commitments to formal equality. The sex-plus theory has the potential to overcome the rigidity of the categorical framework of Title VII by providing protection to a subclass of women, *e.g.*, women with children, even if an employer does not discriminate against all women. But it cannot serve as a transformative device to achieve workplace *accommodations* for women's cultural practices not rooted in biological sex differences, such as caring for children and other dependants. While lactation is biologically-based, breast feeding is seen by judicial decision makers and our society more broadly as a function of women's rational

198. *Id.* Martinez also sued under the Americans with Disabilities Act, 42 U.S.C. § 12102(2) (1994), unsuccessfully arguing that lactation is a disability. *Id.* at 308–09.

199. *Id.* at 310.

200. *Id.* Of course, it is precisely because breast feeding is a condition unique to women that discrimination aimed at breast feeding in the workplace should trigger the protections of Title VII. *Cf.* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 161–62 (1976) ("By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.") (Stevens, J., dissenting).

201. *Martinez*, 49 F. Supp. 2d at 306, 311. In response to decisions like *Martinez* and those cited *supra* note 153, a member of Congress has introduced legislation to amend the Pregnancy Discrimination Act by adding "breast feeding" to "pregnancy, childbirth, or related medical conditions" in Title VII's definition of sex. *See infra* notes 462, 471 and accompanying text.

decisions or possibly a cultural ethic of care, not as an immutable condition. As such, it is not an activity or condition that is protected by Title VII. All Title VII provides to women is the right to participate in the workplace as presently configured, with rare and limited exceptions for those circumstances when women's agency is deemed to be sufficiently impaired to justify protection, *e.g.*, pregnancy and childbirth.

The stories of Teresa Chi and Alicia Martinez represent explicit and bold, if not successful, attempts by women to use our country's employment discrimination laws and judicial system to gain workplace accommodations for their family caregiving responsibilities. But, what about women who are willing, or, more likely, compelled by economic circumstances to accept the structure of the American workplace in order to gain or maintain employment? As demonstrated by *Phillips*, women have successfully used the sex-plus theory of discrimination to challenge employers' failure to hire or promote them on the basis of "stereotypical" assumptions about their limitations due to their status as primary caregivers.²⁰² That is, before they are employed or promoted, women have succeeded in convincing courts that they can conform to the male-worker norm. However, once employed, while some relatively privileged women may be able to pass as male "ideal workers,"²⁰³ perhaps by putting off childbearing or delegating their caregiving and housework to the market, many women inevitably fail.²⁰⁴ When women are penalized by their employers for failing to conform or are disadvantaged *vis-à-vis* coworkers without caregiving responsibilities, Title VII and the model of formal equality on which it is based offer little protection. The stories of Melissa Fuller and Andrea Bass illustrate the difficulties experienced even by women who are attempting to live up to the male worker norm.

iii. Melissa Fuller and Andrea Bass—Melissa Fuller's supervisor at GTE Corporation repeatedly made negative comments about her children and reprimanded her, *inter alia*, for leaving work to pick up her sick child from daycare and failing to "get her priorities straight."²⁰⁵ After Fuller was constructively discharged due to what she alleged to be ongoing harassment, she sued GTE, arguing that

202. See *supra* note 166.

203. See Williams, *supra* note 15, at 834.

204. Moreover, those who "succeed" often do so at great personal cost. There is a substantial body of sociological literature examining the relationship between work/family conflict, or "role strain," and mental health, family relationships, and physical well-being. See Maureen Perry-Jenkins et al., *Work and Family in the 1990s*, 62 J. MAR. & FAM. 981, 989-90 (2000) (reviewing studies); Shelton, *supra* note 24, at 315-16 (same).

205. Fuller v. GTE Corp., 926 F. Supp. 653, 656 (M.D. Tenn. 1996).

she was discriminated against on the basis of her sex plus her "status as a mother of young children."²⁰⁶ The court found that she failed to make a prima facie claim of discrimination, reasoning that she "was replaced by another mother" and that she "failed to show that she was treated differently from fathers with young children."²⁰⁷ Fuller worked in a largely sex-segregated department,²⁰⁸ rendering the generation of such comparative evidence nearly impossible, and the person who replaced her had older children.²⁰⁹ But these important facts, particularly given that Fuller's complaint specifically alleged discrimination against mothers with young children, did not find their way into the court's opinion.

Nor did a court find the facts presented by Andrea Bass, an Assistant Vice President and Product Manager at Chemical Bank, sufficient to show that she was a victim of sex discrimination under a sex-plus theory.²¹⁰ Chemical Bank began giving Bass lukewarm performance reviews, excluding her from important industry meetings and social gatherings, and reducing her responsibilities, only after she took maternity leave and began on occasion to absent herself from work during normal business hours to shuttle her daughter to and from kindergarten and elementary school.²¹¹ The day Chemical Bank terminated her for an incident related to her "excessive lateness and absenteeism," it promoted a single woman with no children to Vice President, a position for which Bass had been next in line.²¹² According to the court, "because Bass has not produced any evidence to show that Chemical treated her differently than married men or men with children with regard to promotion," her Title VII claim "must fail."²¹³

By finding against the plaintiffs at the prima facie stage, the *Fuller* and *Bass* courts successfully avoided any discussion of the real

206. *Id.*

207. *Id.* at 657.

208. Seventy-five percent of the employees in Fuller's department were women, and, of the male employees, only one had children. *Id.* at 656.

209. *Id.*

210. *Bass v. Chem. Banking Corp.*, No. 94 Civ. 8833 (SHS), 1996 WL 374151, at *5 (S.D.N.Y. July 2, 1996).

211. *Id.* at *1-3.

212. *Id.* at *3.

213. *Id.* at *5. Curiously, Bass's discriminatory termination claim did survive summary judgment on the basis of evidence that her supervisor had difficulty working and communicating with women, would not attend meetings conducted by women, invited male but not female employees to lunch and to his home for get-togethers, and permitted men but not women to attend certain business conferences and seminars. *Id.* at *6. Why this evidence was not relevant to Bass's promotion claim is not explained by the court. The fact that a woman was promoted instead of Bass apparently blinded the court to the relevance of these facts, notwithstanding the fact that such reasoning is explicitly precluded by the holding in *Phillips*.

gravamen of the plaintiffs' cases: Fuller and Bass required workplace accommodations for their childcare responsibilities that are not available under Title VII. Unlike Teresa Chi and Alicia Martinez, who formally sought accommodations from their employers to care for their newborn children, Fuller and Bass were also seeking accommodations, albeit privately and quietly with the hope that no one would notice.²¹⁴ When they were "caught," like countless women privately suffering with the conflict between their caregiving and work responsibilities, Title VII afforded them no protection.²¹⁵ As Kathryn Abrams pointed out more than ten years ago, "An employer may not be able to penalize women when they behave too much like men, but he is not barred from penalizing them when they behave too much like women."²¹⁶

Perhaps the outcome in these cases and others like it should not be surprising. The result was arguably presaged more than thirty years ago when, in *dictum*, the Court suggested in *Phillips v. Martin Marietta* that if Martin Marietta could show that conflicting family obligations were "demonstrably more relevant to job performance for a woman than for a man,"²¹⁷ then it might be able to legally justify its discriminatory policy under Title VII's "bona fide occupational qualification" (BFOQ) exception.²¹⁸ According to one account, this language was added at the bequest of Chief Justice Burger, who feared that judges might otherwise be required to hire female law clerks and, consistent with prevailing attitudes of the time, thought that women were naturally unsuited for some jobs.²¹⁹ This language was the subject of much criticism, both by commentators and Justice Marshall in his concurring opinion. Justice Marshall warned, "The exception for a 'bona fide occupational qualification' was not intended to swallow the rule."²²⁰ Justice

214. In a footnote, the *Fuller* court seemed to acknowledge this when it defensively said, "Despite the argument, valid in many cases, that *women often take on greater responsibilities than some men for parenting their children*, this Court cannot find that parenting is unique to women." 926 F. Supp. at 658 n.3 (emphasis added).

215. Cf. *Noyer v. Viacom Inc.*, 22 F. Supp. 2d 301, 302, 305-08 (S.D.N.Y. 1998) (finding that Senior Vice President of cable network whose job responsibilities were transferred in part to a consultant and who was excluded from certain meetings and high level decisions after her return from maternity leave did not suffer discrimination under Title VII or the Family and Medical Leave Act).

216. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1231 (1989).

217. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

218. Employers may utilize the statutory BFOQ defense "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1994).

219. Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 342-47 (1999).

220. *Phillips*, 400 U.S. at 545 (Marshall, J., concurring).

Marshall's fears have never materialized, but not because the Court ultimately interpreted the BFOQ defense quite narrowly.²²¹ Rather, it is the lower courts' commitment to formal equality that has "swallowed the rule." As the four cases discussed herein demonstrate, most sex-plus parenting cases never survive a pretrial dispositive motion on the existence of a *prima facie* case, much less succumb under the BFOQ defense. This is because Title VII requires only that employers afford women an opportunity to enter and advance in the workplace according to its preexisting androcentric terms; it does not require any structural accommodations for women's cultural caregiving work now that they have "arrived."

Recently, heartened by a few favorable decisions, a number of commentators have looked to the underutilized sex-plus theory of discrimination first articulated in *Phillips* as a potential resource for challenging the gendered structure of the American workplace. Martha Chamallas notes that disparate treatment theory affords women the "opportunity to convince a jury that, in their case, the work/family conflict was all in the employer's mind."²²² Similarly, citing the case of *Trezza v. Hartford, Inc.*,²²³ Joan Williams urges that "[t]hese new 'I had a baby, not a lobotomy' suits have tremendous potential, for discrimination against mothers remains very open today, precisely because it is not now conceptualized as discrimination."²²⁴ In *Trezza*, a federal district court held an attorney with children had established a *prima facie* case of sex-plus discrimination under Title VII when her employer thrice passed her over for a promotion to management, instead offering the positions to less qualified men with children and to a woman without children.²²⁵ *Trezza* is an example of a woman able to succeed according to the traditional expectations of the American workplace—that is, to work long hours with little flexibility or recognition of outside caregiving obligations in the terms, conditions, or benefits of employment. As the court repeatedly emphasized, she had

221. See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991) (holding that the BFOQ defense is allowed only when "distinctions based on sex . . . relate to ability to perform the duties of the job"); *Donthard v. Rawlinson*, 433 U.S. 321, 332 (1977) ("Discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.") (quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971)).

222. Chamallas, *supra* note 219, at 354.

223. No. 98 Civ. 2205 (MBM), 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

224. WILLIAMS, *supra* note 45, at 102; see also Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 328 (1999).

225. 1998 WL 91201, at *1-3, *6-7.

"consistently excellent employment evaluations."²²⁶ But, as the stories of Teresa Chi, Alicia Martinez, Melissa Fuller, and Andrea Bass demonstrate, we should be less sanguine about a legal strategy dependent upon demonstrating that a woman's painfully real work/family conflicts are simply a figment of her employer's imagination. This is particularly so in cases of termination and demotion, when the reality of women's family caregiving responsibilities often can no longer be hidden.

And why should they be? Women's "satisfactory work performance"²²⁷ given the current structure of the American workplace is often dependent on conditions that have, at best, been elusive for most women and, at worst, downright harmful. These conditions include the disappearance of the gendered division of caregiving within the family, the reemergence of the traditional, two-parent family norm, and the delegation of family caregiving work to the market, where it is typically performed by low-paid domestic and childcare workers who are disproportionately poor women and women of color.²²⁸ While the sex-plus theory of discrimination will

226. *Id.* at *2.

227. *See supra* note 182.

228. *See supra* notes 38, 46, 84 and accompanying text. Vicki Schultz has recently criticized feminist legal theorists for proposing legal reforms that "assume[] that housework is, and will continue to be, 'women's work.'" Schultz, *supra* note 42, at 1905. She suggests that feminists should continue to work toward a more egalitarian division of labor within marriage. *Id.* at 1906-97. To the extent this egalitarian division is not attainable, Schultz proposes that family work should be "handed over to day-care providers, cleaning services, home health aides, landscapers, and the like." *Id.* at 1901. To be sure, in our modern society, some commodification of household labor is both inevitable and healthy, and there has been some limited progress on the home front with regard to men's contribution to household labor. *See supra* Part I. Moreover, as Schultz points out, a commodification strategy offers opportunities to organize and protect domestic workers which are not available when such work is performed behind the privatizing shield of the family and marriage. Schultz, *supra* note 42, at 1901-02. However, this classically liberal reallocation/commodification strategy has been elusive for all but the most privileged women. Despite thirty years of advocacy, and despite significant increases in women's labor force participation, women still perform the vast majority of childcare and household work in our society. *See supra* Part I. Moreover, to the extent that the commodification/reallocation strategy assumes the presence of a man and the financial resources and desire to hire outside domestic help, it perpetuates a distinctly white, heterosexist view of the family. Given our country's history of control over minority women's reproduction, mothering, and labor, *see supra* notes 39 and 46 and accompanying text, we should not assume that all women seek to transfer their family caregiving work to the market, or that doing such work in the market, even for decent wages and under favorable conditions, represents progress for all women. Finally, the reallocation/commodification strategy fails to fundamentally challenge the discriminatory structure of market work. It simply seeks to enlist men and the market in assisting women so that they can participate in the workplace according to the male-worker norm. Of course, we should continue to contest the gendered division of labor within the family, and we should work doggedly to ensure that women have meaningful access to paid work and the economic, social, and political benefits that flow from it. But we should do so in ways that do not discredit the significance of caregiving to living a full life, and in ways that do not

continue to be useful for some women, particularly to privileged women who are seeking to enter and advance in the workforce, the foregoing analysis suggests that it cannot fundamentally challenge the discriminatory structure of the American workplace.²²⁹ Indeed, to the extent that the theory is used to press claims similar to Phillips' and Trezza's, it may in fact harm those women most in need of the law's protections by reifying the existing structure of work.

2. *Disparate Impact Cases*—Because discriminatory intent is difficult to show in an era when employers rarely differentiate explicitly between male and female employees, and because of the limitations of the disparate treatment theory of discrimination even if a woman could show discriminatory intent, a more likely vehicle to challenge the current structure of work is the "disparate impact" claim under Title VII. Under this approach, women might challenge a variety of "neutral" criteria that disparately impact them because of their caregiving responsibilities.²³⁰ Proof of discriminatory motive is not required under disparate impact theory.²³¹ This framework is seemingly well suited to address the discrimination women experience at work on the basis of their cultural caregiving, which is typically the product not of hostile intent, but of the distinctly American structure of work which assumes that workers do not have competing family obligations. Still, even the disparate impact theory of discrimination is limited in its ability to address women's work/family conflicts.

exploit or leave behind women not privileged by race, class, and marriage. Schultz's other proposals, such as reducing the standard workweek, are more consistent with these criteria than a reallocation/commodification strategy. See Schultz, *supra* note 42, at 1957.

229. The "English-only" cases also illustrate Title VII's limited ability to protect employees from discrimination on the basis of mutable and real, *e.g.*, cultural, differences. In these cases, employees challenging employer English-only work rules under Title VII as discrimination on the basis of national origin "plus" language rarely have prevailed. Applying the sex-plus theory of discrimination, courts reason that language is mutable, particularly where the employee speaks some English, and that there is no fundamental right to speak one's native language where it "disrupts" the established operation of the workplace. See Mary Ellen Maatman, *Listening to Deaf Culture: A Reconceptualization of Difference Analysis Under Title VII*, 13 HOFSTRA LAB. L.J. 269, 298–308 (1996) (summarizing English-only cases). Courts have similarly rejected workplace accommodation of "ethnic traits," such as braided hair. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994); Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985).

230. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (construing Title VII to proscribe "not only overt discrimination but also practices that are fair in form but discriminatory in operation").

231. *Teamsters v. United States*, 431 U.S. 324, 335–36, 335 n.15 (1977) (citation omitted) (construing Title VII of Civil Rights Act of 1964).

First, a "neutral" employer policy or practice must be identified before it can be challenged under Title VII's theory of disparate impact. As other critics of the existing legal framework have observed, Title VII merely provides women with the negative right to be free of employment discrimination, but places no affirmative duties on employers to make women, who are differently situated with regard to their family obligations, equal in fact.²³² So long as the harm to women of the current workplace structure is viewed as stemming from employers' positive actions, then Title VII will be incapable of addressing women's work/family conflicts, even under a disparate impact theory of discrimination.²³³ While there are many identifiable, affirmative employer practices and policies that serve to disadvantage women in the workplace, they are so entrenched, so accepted as the norm, that they are virtually invisible. Such invisible, "non policies" and practices include the expectation of long work hours,²³⁴ rigid work

232. See, e.g., Dowd, *Gender Paradox*, *supra* note 64, at 141–42 ("The limited potential of discrimination analysis is also related to its inability to reach cases in which an employer has failed to adopt any policy . . .").

233. See, e.g., *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144–45 (1977) (finding that employer's failure to provide sick pay during mandatory pregnancy leave is not a *per se* violation of Title VII under disparate impact theory). There are rare exceptions to the "non policy" problem of Title VII. *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (holding that ten-day maximum disability leave policy disparately impacts women, because only women can become pregnant). The *Abraham* court asserted, "it takes little imagination to see that an omission may in particular circumstances be as invidious as positive action." *Id.*; see also *Roberts v. United States Postmaster Gen.*, 947 F. Supp. 282, 289 (E.D. Tex. 1996) ("[A]n employer can . . . violate Title VII by failing to provide an adequate [leave] policy.").

234. There is an ongoing debate among economists sparked by Juliet Schor's book, *THE OVERWORKED AMERICAN* (1991), about whether the average hours per worker in the United States has been increasing over the past few decades. Lonnie Golden & Deborah Figart, *Doing Something About Long Hours*, 43 CHALLENGE 15, 22 (2000) (summarizing controversy). Schor presented findings based on federal Department of Labor data that annual work hours are increasing significantly. SCHOR, *supra*, at 1–15. Subsequent research, while not uniform, indicates that the average hours worked per week for all workers in the United States have, in fact, remained relatively steady over the past forty years, or have been increasing slightly. DOL REPORT ON THE AMERICAN WORKFORCE, *supra* note 11, at 80–81; Deborah M. Figart & Lonnie Golden, *The Social Economics of Work Time: Introduction*, 56 REV. SOC. ECON. 411, 441 tbl.1 (1998) (summarizing key studies).

However, there is a general consensus that certain sectors of the workforce are indeed working substantially more. DOL REPORT ON THE AMERICAN WORKFORCE, *supra* note 11, at 80–81. Longer workweeks are most common among professionals and managers, married couples, and white men. Jerry A. Jacobs & Kathleen Gerson, *Who Are the Overworked Americans?*, 56 REV. SOC. ECON. 442, 445 (1998). At the same time, less educated workers, nonprofessional workers, and African American men are working fewer hours per week than in the past. *Id.* The result has been a bifurcation of the workforce between overworked salaried employees and underemployed, part-time employees without benefits. *Id.* at 445–47; Golden & Figart, *supra*, at 26.

Moreover, research suggests that the recent attention to the "overworked American" and long work hours may be as much a function of major social changes as of increasing work

schedules,²³⁵ limited personal leave,²³⁶ strict limits on absenteeism, prolonged probation or evaluation periods, frequent or extended travel, and the general second-class treatment of part-time employees,²³⁷ just to name a few. In America, such non policies are so much a part of the employment landscape that they are subsumed within the very definition of employment. They are not seen as policies or practices, but simply "work." This poses a major obstacle to obtaining relief given the current configuration of the law. Unmasking the ways in which non policies and practices disproportionately disadvantage women is no mean feat, entailing a radical revisioning of the structure of work just to fashion a *prima facie* claim of disparate impact discrimination under Title VII.²³⁸ The existence of only a handful of mostly unsuccessful disparate impact challenges to employer leave,²³⁹

hours among certain segments of the population. Jacobs & Gerson, *supra*, at 443, 455–56. To the extent that women's labor force participation has increased dramatically over the past three decades, even if most do not work excessive hours, women uniquely experience a time bind because they continue to be disproportionately responsible for housework and childcare. See *supra* Part I. Similarly, men in dual earner families are also likely to experience pressures from the loss of familial support that has accompanied women's entrance into the work force. Jacobs & Gerson, *supra*, at 443. For a general discussion of trends in work hours over the past thirty years and an argument for a reevaluation of the way work hours are regulated, see Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMPLOYMENT L. 457 (1998) [hereinafter Jacobs & Gerson, *Work Week*].

235. The proportion of American workers who are able to vary their work hours somewhat through informal arrangements has increased over the past decade, from 15.1% to 27.6%, but less than six percent have formal flexible work schedules. DOL REPORT ON THE AMERICAN WORKFORCE, *supra* note 11, at 103.

236. In 1997, twenty percent of American workers in medium and large private establishments received paid personal leave; the average was 3.5 days per year. *Id.* at 195 tbl.45.

237. See *supra* notes 71–73 and accompanying text.

238. Joan Williams has called for such a revisioning process, urging an organized, fully-theorized strategy for "litigating motherhood" in *Market Work and Family Work in the 21st Century*, *supra* note 224, at 318 n.92, 328–30.

239. *E.g.*, *O'Hara v. Mt. Vernon Bd. of Educ.*, 16 F. Supp. 2d 868, 887 (S.D. Oh. 1998) (holding that policy requiring teachers taking unpaid parental leave to remain on leave until the beginning of the next school year, even if they are ready to return to work, is not discrimination under Title VII); *Payseur v. Grainger, Inc.*, Nos. 88 C 5707, 88 C 5708, 1989 WL 152583 (N.D. Ill. Nov. 28, 1989) (unsuccessful challenge to employer practice of denying personal leaves of absence for childcare purposes). But see *Roberts v. United States Postmaster Gen.*, 947 F. Supp. 282, 288–89 (E.D. Tex. 1996) (denying defendant's motion to dismiss Title VII claim alleging that employer's policy of not allowing employees to use sick leave to attend to medical needs of family members had disparate impact on women); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (holding that employer's policy requiring employees to work at least one year before they were eligible for sick leave had a disparate impact on women who were more likely to require sick leave due to pregnancy).

travel,²⁴⁰ probation,²⁴¹ and layoff policies,²⁴² and not a single case, to this author's knowledge, challenging long or inflexible work hours under a disparate impact theory,²⁴³ is a testament to this Herculean challenge.

Second, the limitations of the categorical framework of Title VII, while partially solved by the PDA and the sex-plus doctrine in the disparate treatment context,²⁴⁴ continue to plague disparate impact theory. At first blush, the theory of disparate impact appears to encompass a more expansive theory of discrimination such that sex discrimination may exist even though all the women in a particular workplace may not be affected by a given employer policy. According to this view, so long as the "neutral" policy or practice in question disproportionately impacts women in a statistically significant manner,²⁴⁵ the fact that all women are not caregivers should not defeat a disparate impact claim. Courts have not agreed on this issue, however. While some have determined that the categorization problems of disparate treatment analysis are irrelevant in a disparate impact case, others have continued to focus on differences among women to deny relief under this theory as well.²⁴⁶

Furthermore, even where plaintiffs have succeeded in persuading courts to see invisible non practices and policies as "neutral"

240. *E.g.*, *Goicoechea v. Mountain States Tel. & Tel. Co.*, 700 F.2d 559 (9th Cir. 1983) (unsuccessful challenge to extended travel requirement).

241. *E.g.*, *Nweke v. Prudential Ins. Co. of Am.*, 25 F. Supp. 2d 203, 225 (S.D.N.Y. 1998) (unsuccessful challenge to disparate impact of "low-production" probationary period on women who take maternity leave).

242. *See Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1155-56 (7th Cir. 1997) (unsuccessful challenge to employer's practice of laying off part-time workers before full-time workers); *Schallop v. New York State Dep't of Law*, 20 F. Supp. 2d 384, 402-03 (N.D.N.Y. 1998) (unsuccessful challenge to employer's practice of terminating part-time female employees more frequently than full-time employees).

243. *But cf.* *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 38 F. Supp. 2d 18, 20 (D.D.C. 1999). Under a disparate treatment theory, plaintiff challenged employer's decision to terminate her after she refused to change from a part-time to full-time schedule. The court ruled against her, even though the request was made shortly after she announced that she was pregnant for the second time. *Id.* at 19-20.

244. *See supra* Part II.B.1.

245. *See infra* note 247 and accompanying text.

246. *Compare* *Payseur v. Grainger, Inc.*, Nos. 88 C 5707, 88 C 5708, 1989 WL 152583, at *1 (N.D. Ill. Nov. 28, 1989) ("[N]ew mothers, as individuals seeking childcare leave . . . are not members of a protected class. To the extent, then, that plaintiff's claim is based upon disparate impact on new mothers, it must fail."), *with* *Roberts v. United States Postmaster Gen.*, 947 F. Supp. 282, 288-89 (E.D. Tex. 1996) (rejecting defendant's argument that, because plaintiff is alleging disparate impact of employer sick leave policy upon "women with children," she does not fall into a class of persons protected by Title VII), *and* *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 654 (N.D. Ill. 1991) (rejecting defendants' argument that its no sick leave policy did not disparately impact women, but rather only pregnant employees).

ones that disparately impact women because they are more likely to have caregiving responsibilities than men, still other aspects of the Title VII's statutory framework have precluded the successful use of the statute to address women's work/family conflicts. In order to establish a *prima facie* case of disparate impact discrimination, the plaintiff must offer "statistical evidence of a kind and degree sufficient to show that the practice in question" has caused prohibited discrimination.²⁴⁷ While the Supreme Court has rejected rigid mathematical formulas in analyzing statistics purporting to show a disparate impact, "statistical disparities must be sufficiently substantial that they raise . . . an inference of causation."²⁴⁸ Because few men serve as primary caregivers, plaintiffs have had difficulty developing relevant comparisons and therefore providing statistically significant evidence of disparate impact.²⁴⁹

Finally, the "business necessity" defense presents yet another obstacle to women's use of the theory of disparate impact to address the androcentric structure of work. An employer whose facially neutral practice is deemed to have a disparate impact on women may avoid liability by proving that the challenged discriminatory policy or practice is required by business necessity.²⁵⁰ According to the business necessity defense, the challenged practice must be "job related for the position in question and consistent with busi-

247. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

248. *Id.* at 995.

249. *See, e.g., Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1157 (7th Cir. 1997) (finding plaintiff's evidence, consisting of studies showing that the majority of part-time workers are women with child-care responsibilities, insufficient to support claim of illegal disparate impact on women of employer's practice of laying off part-time workers; no comparison was possible because defendant employed no male part-time employees); *O'Hara v. Mt. Vernon Bd. of Educ.*, 16 F. Supp. 2d 868, 887 (S.D. Oh. 1998) (illustrating that the absence of men taking parental leave makes it impossible to prove defendants' parental leave policy disparately impacts women); *Schallop v. New York State Dep't of Law*, 20 F. Supp. 2d 384, 402 (N.D.N.Y. 1998) (finding that plaintiff's evidence that women employees who work part-time are terminated at almost double the rate of male employees who work full-time inadequate to support a disparate impact claim, because no men work part-time); *Payseur*, 1989 WL 152583, at *2 (concluding sample size insufficient to show disparate impact of leave policy that prohibits leave for parenting).

250. The Supreme Court first recognized the business necessity defense in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), holding that if a discriminatory employment practice "cannot be shown to be related to job performance, the practice is prohibited." In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Supreme Court in dictum retreated from the *Griggs* strict business necessity standard, stating that the challenged practice need not be "essential" or "indispensable" to the employer's business to pass muster, and shifting the burden of proof from the employer to the plaintiff. *Id.* at 659-60. Congress reinstated the stronger standard when it passed the Civil Rights Act of 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (codified at 42 U.S.C. § 2000e-2(k) (1994)).

ness necessity.”²⁵¹ Because there is thought to be less employer culpability in a disparate impact case, the Supreme Court has interpreted the business necessity defense as offering greater protections to employers than the BFOQ defense in disparate treatment cases.²⁵² A plaintiff can still win in a case where an employer proves business necessity if she can demonstrate the existence of a less discriminatory alternative (LDA), thus showing that the employer was “using its tests merely as a ‘pretext’ for discrimination.”²⁵³ However, courts have taken the stance that they are “generally less competent than employers to restructure business practices,”²⁵⁴ rendering the business necessity defense very difficult to rebut.²⁵⁵ For these reasons, Title VII has proved to be at best a crude tool to eliminate work rules that disadvantage women with family caregiving obligations.²⁵⁶

3. *Summary*—In sum, the two primary deficiencies plaguing Title VII’s utility as a transformative device to restructure work are the rigidity of its categorical framework and limitations of the model of formal equality on which it is based. Because, at any given time, not all women are either pregnant or caregivers, courts historically were unable or unwilling to see employment discrimination on the basis of pregnancy or caregiving as sex discrimination. The passage of the PDA in 1978 finally put an end to courts’ categorization problems with regard to pregnancy, reconnecting sex and pregnancy so as to render purposeful employment discrimination on the basis of pregnancy illegal sex discrimination. However, the PDA left untouched the limits of Title VII’s categorical framework with regard to women’s cultural

251. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

252. See *Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991).

253. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 804–05 (1973)).

254. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978).

255. See, e.g., *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 1001 (5th Cir. 1984) (finding that airline policy of automatically removing flight attendants from flight duty once their pregnancies were discovered constituted a business necessity, even though less discriminatory alternative of transferring plaintiffs to available ground positions would not have disrupted defendant’s operations).

256. See, e.g., *Goicoechea v. Mountain States Tel. & Tel. Co.*, 700 F.2d 559, 560 (9th Cir. 1983) (dictum) (finding that employer’s extended travel requirement had a “manifest relationship” to plaintiff’s job as a cable splicer); *Ahmad v. Loyal Am. Life Ins. Co.*, 767 F. Supp. 1114, 1119 n.2 (S.D. Ala. 1991) (dictum) (finding that employer practice of not hiring individuals who will require a leave of absence soon after hire serves legitimate goals of company and constitutes business necessity); *Marafino v. St. Louis County Cir. Ct.*, 537 F. Supp. 206, 214 (E.D. Mo. 1982) (same). But see *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (holding that policy requiring employees to work at least one year before they were eligible for sick leave served no legitimate business goal).

caregiving, for all women are not caregivers. Courts have been willing to disregard such differences among women to the extent that the plaintiff is using the sex-plus theory to press a classic stereotyping discrimination claim. Thus, Title VII has been moderately successful in caregiving discrimination cases concerning hiring or promotion, where a woman is able to argue that an employer refused to hire or promote her on the basis of the "stereotypical" assumption that her family responsibilities will interfere with her job performance. However, this innocent-until-proven guilty reasoning has not protected women demoted or terminated to the extent that the reality of their work/family conflicts has become apparent in the workplace. Moreover, Title VII's categorical framework continues to plague disparate impact theory, often leaving outside the law's protections mothers disadvantaged by employer practices that do not similarly affect all women.

The second limitation of Title VII is rooted in the model of formal equality on which the statute is based. All that Title VII requires is the "equal" treatment of men and women. Accordingly, to the extent that employers or states provide leave or disability benefits for conditions experienced by men, they must also provide such leave or benefits to women for analogous conditions such as pregnancy. However, employers that do not provide such benefits to members of their workforces are in full compliance with Title VII, which imposes no affirmative obligations to provide anything, so long as the employer treats all of its workers "equally."

Similarly, Title VII does not require any affirmative employer accommodations for women who are disproportionately burdened with family obligations. First, narrow judicial interpretation of the sex-plus theory requires the "plus" to be a fundamental right or an immutable characteristic. This leaves employers free to discriminate against women on the basis of their cultural caregiving work, because such work is understood by judicial decision makers and society more broadly to be a product of women's choices or gender socialization, but certainly not immutable biological difference. Moreover, while courts have identified "having" children as a fundamental right, none has ever held that receiving workplace accommodations to care for them is.

Even Title VII's disparate impact theory, which is uniquely capable of addressing structural employment discrimination resulting from employers' "neutral" policies or practices, has been unable to address such employer inaction. Where the disparate impact theory has been successful in reaching some employer non

policies, such as inadequate leave, insurmountable problems of proof and the statute's broad business necessity defense have frustrated women's efforts to challenge the discriminatory structure of the workplace through Title VII. In sum, while Title VII has facilitated the entrance of women into the workforce, its failure to provide women with meaningful job security has served to perpetuate a labor force attachment gap between men and women that has serious economic and social consequences for women and children. The FMLA, discussed in the next section, represents a limited and ultimately unsuccessful attempt to fill in the gaps left by Title VII.

C. The Family and Medical Leave Act

In 1993, Congress passed the Family and Medical Leave Act (FMLA or Act)²⁵⁷ in recognition of the fact that "private sector practices and government policies had failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family."²⁵⁸ The FMLA requires employers to provide up to twelve weeks of unpaid leave in a twelve-month period for the care of family members with serious health conditions, for an employee's own serious health condition, or for the birth or adoption of a child.²⁵⁹ While the language of the FMLA is gender neutral, this can largely be attributed to a strategy decision among mainstream women's rights organizers who feared that legislation aimed specifically at women would result in a backlash.²⁶⁰ The findings of the Act explicitly address this issue in the

257. Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601-2654 (1994)).

258. S. REP. NO. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6.

259. Specifically, the FMLA requires covered employers to provide up to twelve weeks of unpaid leave during a twelve-month period to any eligible employee who needs the time off (1) for a serious health condition of the employee that prevents him/her from performing the essential functions of his/her job; (2) to care for the employee's spouse, son, daughter, or parent where that family member has a serious health condition; (3) for the birth of a child of the employee, in order to care for the child; and (4) for the placement of an adopted or foster child with the employee. 29 U.S.C. § 2612.

260. This position is reflected in Eleanor Holmes Norton's testimony in support of the FMLA in 1987:

Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, employers would very likely be reluctant to hire or promote women of child-bearing age. Under the proposed legislation, however, because employers would be required to provide job-protected leaves for all employees in circumstances that affect them all approximately equally, they would have no incentive to discriminate against women.

statement that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender."²⁶¹ Yet, also codified within the Act is the finding that "the primary responsibility for family caregiving often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."²⁶² While cloaking the Act in gender neutrality might have eased the Act's passage and may very well protect it from an equal protection challenge, I contend here as I have elsewhere that such benefits do not come without a cost to women.²⁶³ Like Title VII and the PDA, the Family and Medical Leave Act has increased public perceptions of women as wage earners. However, at the same time, the gender neutrality of the Act perpetuates the myth that women and men share equally in the burdens of caregiving. Ironically, this is the very myth that underlies the current discriminatory structure of the workplace which the FMLA purports to ameliorate.²⁶⁴ In an effort to expose the myth of the "ideal worker"²⁶⁵ which the FMLA fails to challenge, I discuss the implications of the Act exclusively for women despite the fact that it covers "eligible employees."²⁶⁶

In doing so, I do not mean to deny that progress has been made with regard to the redistribution of caregiving and housework within the family. Few men today expect to be immune from household work, and some men contribute significantly.²⁶⁷ Further, studies indicate that men want to be more involved with their children.²⁶⁸ Nor can we ignore the influence of patriarchy on men in

Family and Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service on H.R. 925, 100th Cong. 39 (1987) (statement of Eleanor Holmes Norton) (citation omitted); see also Lenhoff & Becker, supra note 132, at 418-21 (asserting that gender neutral structure of the FMLA is necessary to prevent sex discrimination against women by employers); Dowd, Gender Paradox, supra note 64, at 81 n.5 ("There is . . . a strategic problem with labeling work/family conflict a women's issue [I]t will fall to the bottom of political priorities and social consciousness [I]t will become invisible.").

261. 29 U.S.C. § 2601(a)(6).

262. *Id.* § 2601(a)(5).

263. See Kessler, *supra* note 5, at 323-24 (arguing that the name "Aid to Families with Dependent Children" disguises the fact that welfare is a women's issue).

264. Christine Littleton made this argument, much more fully than I do here, in *Does It Still Make Sense to Talk About "Women"?*, *supra* note 48, at 19-38.

265. Here, I use Joan Williams' term for the theoretical employee unencumbered by caregiving responsibilities. Williams, *supra* note 15, at 822.

266. 29 U.S.C. § 2611(2).

267. Malin, *Fathers and Parental Leave Revisited*, *supra* note 77, at 34-36 & nn.46-59 (collecting studies).

268. See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1064-66 & nn.116-20 (1994) [hereinafter Malin, *Fathers and Parental Leave*]; Malin, *Fathers and Parental*

explaining the continuing imbalance between men and women in the distribution of caregiving work.²⁶⁹ Workplaces are often hostile toward men seeking parental leave.²⁷⁰ As Katharine Bartlett has stated, "The mystifying ideologies of gender construction control men, too, however much they may also benefit from them."²⁷¹ But feminists' earlier vision that women's entrée into the wage market and public world would be accompanied by the equal sharing of caregiving labor by men has not materialized.²⁷² By all measures, women remain responsible for the vast majority of housework and childcare as we enter the third millennium.²⁷³ Moreover, while the transformation of male behavior is a worthy goal, such a strategy is troubling to the extent that it is premised upon the existence of the heterosexual, two-parent family, leaving out, among others, single mothers who now make-up fully one-third of families with children less than eighteen years old.²⁷⁴ Indeed, single motherhood is the predominant family form in the African-American community.²⁷⁵ For these reasons, the peculiar injury to women of the failings of our employment antidiscrimination laws remains the focus of this Article, and I will discuss the limitations of the FMLA with regard to women, despite its gender neutrality.²⁷⁶

Leave Revisited, *supra* note 77, at 33–36; Selmi, *supra* note 131, at 711 n.12 (collecting studies).

269. I nod here to Joan Williams' extensive scholarship on the organization of market work in America, in which she has emphasized the role of "masculine gender performance" in perpetuating the current structure and in harming working class men unable to live up to the male-worker ideal in particular. *E.g.*, WILLIAMS, *supra* note 45, at 25–30, 78.

270. *See, e.g.*, Knussman v. Maryland, 16 F. Supp. 2d 601, 609 (D. Md. 1998) (denying employer's summary judgment motion where state police officer was denied FMLA leave to care for newborn); *see also* Malin, *Fathers and Parental Leave*, *supra* note 268, at 1077–79.

271. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 876 (1990).

272. A uniquely European response to this universal failure was a recent initiative by the Green Party in Germany to seek the passage of a law obliging men to do a share of married couples' housework and giving wives who do not work a legal claim to part of their husband's income. *Laws That Will Make Men Do the Chores*, DAILY MAIL, May 20, 1999, available at 1999 WL 19060988.

273. *See* discussion *supra* Part I.

274. *See* CENSUS HOUSEHOLD/FAMILY CHARACTERISTICS, *supra* note 50, at 117 tbl.11.

275. *Id.*; *see also* Twila L. Perry, *Caretakers, Entitlement, and Diversity*, 8 AM. U. J. GENDER SOC. POL'Y & L. 153, 156 ("A theory in which the perceived rights of women are not dependent on their relationships to men places the choices of women not attached to men or attached to low-income men on the same level as the choices of women who are linked to men who have money.").

276. It is acknowledged that a legislative solution that applies only to women in all likelihood would not pass constitutional muster under the Equal Protection Clause. The Court has struck down virtually all sex-specific legislation benefiting women as inconsistent with the Fourteenth Amendment. Becker, *supra* note 91, at 249–50. Moreover, some commentators suggest that the Court's recent decision in *United States v. Virginia*, 518 U.S. 515 (1996), in which the Court held that Virginia's refusal to admit women to its state-supported military academy violated the Fourteenth Amendment, signals that the Court is moving toward

The FMLA covers only a portion of America's workforce, benefits only the most privileged workers, and does little to address the everyday leave needs of women, who bear a disproportionate share of nurturing responsibilities in our society. The FMLA applies only to employers with fifty or more employees,²⁷⁷ exempting from the Act's coverage ninety-five percent of American businesses and about half of the work force.²⁷⁸ The Act does not cover employees who work on average less than twenty-five hours per week.²⁷⁹ To be eligible for FMLA leave, an employee must be employed by a covered employer for at least twelve months.²⁸⁰ These conditions, taken together, effectively limit the Act's application to a minority of women workers, since women are more likely than men to work for small businesses,²⁸¹ to work part-time,²⁸² to work in occupations with little job security,²⁸³ and to interrupt their careers due to family responsibilities.²⁸⁴ Moreover, the FMLA's provision of unpaid

a strict level of scrutiny for sex. *E.g.*, Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1675 (1997); Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 72–79 (1996). Still, others have argued otherwise. Candace Kovacic-Fleischer suggests that in requiring the Virginia Military Institute not only to admit women but also to accommodate their physical strength and privacy concerns by adjusting the school's physical skills requirements and altering its housing set-up, the Court articulated a new sex discrimination jurisprudence of substantive equality. Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding, and Childcare*, 44 VILL. L. REV. 355, 359–63 (1999).

277. Family and Medical Leave Act of 1993, 29 C.F.R. § 825.104(a) (2000).

278. H.R. REP. NO. 103-8, pt. 1, at 60 (1993) (reporting that Act only covers five percent of American businesses); DAVID CANTOR ET AL., *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS* § 1.6, at 1–9 (2000) (Westat report funded by the Dep't of Labor under contract MS-23F-8144H), available at <http://www.dol.gov/dol/asp/public/fmla/toc.htm> (reporting that in 1995, 54.9% of public and private sector employees combined, and 46.5% of private sector employees, worked in establishments covered by the FMLA and were eligible for FMLA leave); Waldfogel, *supra* note 131, at 14 (reporting that the FMLA covered forty-six percent of the private-sector workforce when passed, and about sixty percent as of 1996).

279. Specifically, an employee is covered if (s)he works "at least 1,250 hours . . . during the . . . 12-month period" immediately preceding commencement of FMLA leave (on average, twenty-five hours per week). 29 U.S.C. § 2611(2)(a)(ii) (1994).

280. See *Jessie v. Carter Health Care Ctr., Inc.*, 926 F. Supp. 613, 617 (E.D. Ky. 1996).

281. See 139 CONG. REC. S1691 (Feb. 2, 1993) (citing report of Small Business Administration to the President regarding the FMLA).

282. See BLS, *PART-TIME EMPLOYMENT*, *supra* note 63.

283. Contingent workers holding jobs that are not expected to last are more likely than noncontingent workers to be women. BLS, *Contingent Employment*, *supra* note 67, at 3. Occupations predominated by women, *e.g.*, food and health service workers, secretaries, and retail sales workers, are among those with the lowest employee tenure. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Tenure in 1998*, tbls.5 & 6 (Sept. 23, 1998), available at <http://stats.bls.gov/newsrels.htm>. One-third to one-half of U.S. workers of childrearing age, regardless of sex, have been employed with their current employer for twelve months or less at any given time. *Id.* at tbl.3.

284. In 1996, three out of four persons who were neither working nor looking for work were women. BLS, *WHO'S NOT WORKING*, *supra* note 69, at 1. The large majority, seventy

leave renders its protections out of reach of all but the most privileged working women²⁸⁵ and constitutes little more than a cruel joke for single mothers,²⁸⁶ who are disproportionately women of color.²⁸⁷ The Act's provision that employers may deny guarantees of post family-leave reinstatement to those among the top ten percent in compensation at a particular work site may exclude privileged women too.²⁸⁸ Like the PDA's "position elimination" defense, the FMLA's provision that employers' responsibilities under the Act "cease at the time the employee is laid off"²⁸⁹ leaves women vulnerable to the common business practice of laying off those employees unable to protect their positions because they are absent from work or unable to conform to the male-worker norm.²⁹⁰

percent, interrupted their labor force participation because of caregiving responsibilities.
Id.

For an example of how interruptions in women's careers for caregiving can subsequently limit their eligibility for family and medical leave, see *Robbins v. Bureau of Nat'l Affairs*, 896 F. Supp. 18, 21 (D.D.C. 1995) (finding that a pregnant employee could not include her previous FMLA-covered maternity leave when calculating the hours of service eligibility requirement, and thus she was not entitled to take FMLA leave because she worked only 875.75 hours in the twelve months preceding the beginning of the leave).

285. Women most likely to take family leave are married, have a graduate school education, earn higher incomes, and are salaried workers. CANTOR ET AL., *supra* note 278, § 2.1.4, at 2-9. Because the FMLA makes no provision for wage-replacement, only about one-fifth of eligible employees covered by the Act even take family or medical leave, and few for more than a couple of weeks. *Id.* § 2.1.2, at 2-7, § 3.5.1, at 3-13; *Most Employees in United States Are Not Aware of FMLA Provisions, BNA Telephone Survey Finds*, 147 LAB. REL. REP. (BNA) 521, 523-24 (Dec. 26, 1994). Of those employees who need family or medical leave and do not take it, more than three-quarters cite being unable to afford it as the primary reason. CANTOR ET AL., *supra* note 278, § 2.2.4, at 2-15 to 2-16.

286. As compared to all employees, leave-takers are significantly less likely to be separated, divorced, widowed, or never-married (twenty-five percent) than married or living with a partner (seventy-five percent). CANTOR ET AL., *supra* note 278, app. tbl.A2-2.4. Those who need employment leave but are unable to take it are significantly more likely to be hourly workers, to earn less than \$30,000 a year, and to be separated, divorced, or widowed. *Id.* § 2.3, at 2-19. It is no small irony that Congress justified the FMLA, in part, because, "[l]ower-income employees, who have the fewest resources to cushion the financial loss of absence from work, are most in need of job-protected leave and most in need of government's assurance that they can get it." S. REP. NO. 102-68, at 83 (1991).

287. Single parenthood is the predominant family form among blacks. Just over one-half of all black families with children under eighteen are female-headed, single parent families. CENSUS HOUSEHOLD/FAMILY CHARACTERISTICS, *supra* note 50, at 117 tbl.11.

288. The statute allows employers, under certain circumstances, to deny leave to certain "key employees" if they are "among the highest paid [ten] percent" of employees. 29 U.S.C. § 2614(b)(2) (1994). Because there are far fewer women than men in high-paid positions, the "key employee" exemption has the perverse effect of forcing women in dual-earner marriages to take leave instead of their husbands. For a discussion of these and other problems with the "key employee" exception to the FMLA, see Neil S. Levinbook, Note, *The Family and Medical Leave Act: Unlocking the Door to the "Key Employee" Exemption*, 15 HOFSTRA LAB. & EMP. L.J. 513, 514, 531-33 (1998).

289. Family and Medical Leave Act of 1993, 29 C.F.R. § 825.216(a)(1) (2000).

290. See, e.g., *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1157 (7th Cir. 1997) (finding that employer had no obligation to offer reinstatement to employee on FMLA leave, since

In the case of childbirth or the adoption of a child, an employer may require that an employee take her twelve weeks of FMLA leave all at once, rendering part-time or otherwise modified work schedules a non-option in many circumstances.²⁹¹ Moreover, the twelve-week maximum applies to all types of leave.²⁹² Thus, for example, if a woman takes four weeks of leave to deal with a difficult pregnancy or to care for a seriously ill relative, she would be left with only eight weeks to care for her newborn. This rule has the perverse effect of rendering women less likely than men to have a full twelve-weeks of leave to care for a newborn, since women alone face the risk of physical disability during pregnancy, and since women disproportionately care for seriously ill family members.²⁹³ Furthermore, the Act's definitions of those dependents triggering an employee's eligibility for parental leave reflect an unmistakably white, middle class, and heterosexist vision of the family, excluding domestic partners, children unrelated to the worker, and grandchildren.²⁹⁴

Most significantly, the FMLA does little to address the everyday leave needs of caregivers, the vast majority of whom are women. Given the narrow regulatory and judicial interpretations of "serious health condition," the Act does not provide for leave to attend to common childhood illnesses. While the Department of Labor regulations state that the Act covers health conditions lasting more than three consecutive calendar days, explicitly excluded are the common cold, the flu, earaches, upset stomachs, minor ulcers, headaches, and routine dental or orthodontia problems, among other common illnesses, "unless complications arise."²⁹⁵

her position was eliminated during her absence); *Patterson v. Alltel Info. Serv., Inc.*, 919 F. Supp. 500, 505 (D. Me. 1996) (holding that termination as part of company-wide reduction-in-force was not related to FMLA leave).

291. 29 U.S.C. § 2612 (b)(1) (1994) provides: "Leave under subparagraph (A) or (B) of subsection (a)(1) of this section [for the birth or adoption of a child] shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise." Given this provision, only fifteen percent of employees using family and medical leave to care for a newborn, newly adopted, or newly placed foster child do so on an intermittent basis. CANTOR ET AL., *supra* note 278, § 2.1.5, at 2-12 to 2-13 & tbl.2.13.

292. 29 U.S.C. § 2612.

293. See sources cited *supra* notes 25–26.

294. Recent census information reveals that while only 6% of white children less than fifteen years of age live with persons other than their father or mother, 14.7% of black children and 10.6% of Hispanic children do. Terry A. Lugaila, *Marital Status and Living Arrangements: March 1998 (Update)*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REP. P20-514, at tbl.3 (Dec. 1998).

295. Family and Medical Leave Act of 1993, 29 C.F.R. § 825.114(c) (2000). Similarly, the regulations promulgated by the Department of Labor limit pregnancy leave under the Act to a "period of *incapacity* due to pregnancy," 29 C.F.R. § 825.114(a)(2)(ii) (2000)

Thus, for example, courts have determined that a parent who must stay at home with a child who has an uncomplicated ear infection or the chicken pox, even if it lasts for a week or more, would not be eligible for leave and is not protected from termination under the Act.²⁹⁶ Nor does the Act permit leave to care for extended relatives, such as grandparents.²⁹⁷ Most glaring, the FMLA does not provide for any leave to care for a healthy dependent who is not a newborn.²⁹⁸ Obviously, children need full-time care before they are school age. Even for children in school, the school day is considerably shorter than the average work day, and school-age children have far more holiday and vacation leave than their parents.²⁹⁹ Often, elderly parents or relatives need assistance even though they may not be seriously ill.³⁰⁰ Nor does the Act address common daycare or other family emergencies.³⁰¹ In sum, the

(emphasis added), but do not mention normal pregnancy. Thus, courts have interpreted the FMLA as requiring a woman to have medical proof that her pregnancy is abnormal and incapacitating in order for her to invoke FMLA leave prior to delivery. *E.g.*, *Gudenauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 475 (D. Kan. 1996) (holding that because morning sickness, stress, nausea, back pain, swelling, and headaches are part of normal pregnancy, employee terminated due to absences during pregnancy was not protected by FMLA). For detailed discussions of the narrow judicial interpretation of "serious health condition" under the FMLA, see Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 240-44 (1997), and William McDevitt, *Evaluating the Current Judicial Interpretation of "Serious Health Condition" Under the FMLA*, 6 B.U. PUB. INT. L.J. 697, 704-14 (1997).

296. *Reich v. Midwest Plastic Eng'g, Inc.*, 934 F. Supp. 266, 268 (W.D. Mich. 1996) (holding that employee terminated because of absence from work to care for children with the chicken pox not protected by FMLA); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 246 (E.D. Pa. 1994) (holding that employee who lost job because of absence from work to care for child with an ear infection not protected by FMLA).

297. 29 U.S.C. § 2612(a)(1)(c). (1994) (stating an employee entitled to leave in order to care for a spouse, son, daughter, or parent); *see also, e.g.*, *Krohn v. Forsting*, 11 F. Supp. 2d 1082, 1091 (E.D. Mo. 1998) (holding that firefighter not entitled to FMLA leave to care for her ninety-four year-old grandparent).

298. *See, e.g., Krohn*, 11 F. Supp. 2d at 1092 (holding that firefighter was not entitled to FMLA leave to care for her son who was more than one year old and did not suffer from a serious health condition).

299. Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 449 n.106 (1990) (reviewing studies showing that school-age children are not in school eighty-three days per year on average, exclusive of weekends) [hereinafter Dowd, *Restructuring Work*].

300. *See supra* notes 25-26 and accompanying text. *Cf., e.g.*, *Cianci v. Pettibone Corp.*, No. 95 C 4906, 1997 U.S. Dist. LEXIS 4482, at *20 (N.D. Ill. 1997) (holding that FMLA does not provide leave to visit ill parent, only to care for ill parent).

301. *See, e.g., Kelly v. Crosfield Catalysts*, 962 F. Supp. 1047, 1048 (N.D. Ill. 1997) (finding that FMLA is not a general grant of leave for every family crisis and that an employee's emergency trip to prevent child from being declared a ward of the state did not meet standards for FMLA coverage); *see also Martyszenko v. Safeway*, 120 F.3d 120, 123 (8th Cir. 1997) (holding that time off to supervise child suspected of being molested not covered by FMLA).

FMLA makes little provision for women's most common, day-to-day caregiving responsibilities.

Feminist proponents of the Family and Medical Leave Act argued for its passage as a necessity to "fill the gaps" left by Title VII and the Pregnancy Discrimination Act. Testifying before Congress in 1985 in support of the FMLA's unsuccessful but essentially similar predecessor, the Parental and Disability Leave Act, Wendy Williams explained, "[W]hile Title VII as amended by the PDA has required that benefits and protections be provided to millions of previously unprotected women wage earners in this country, it leaves gaps which an antidiscrimination law cannot, by its nature, fill. This bill . . . is designed to fill those gaps."³⁰² But an examination of the final contours of the FMLA reveals that it only minimally filled one such "gap." As the table *infra* illustrates, because the FMLA does not provide job security to women who are absent from work to care for healthy children older than three months of age, to address daycare or other family emergencies, or to care for elderly or sick family members who are not seriously ill, among other reasons, the Act does not fill the "gap" left by the failure of Title VII's sex-plus theory of discrimination to protect women from demotion or termination on the basis of their most-typical competing family responsibilities. Second, because the FMLA provides for only twelve weeks of unpaid leave, which employers may require employees to take all at once, the Act does not fill the "gap" left by the inability of Title VII's theory of disparate impact to address employer "nonpolicies" that disadvantage women workers due to their family caregiving responsibilities. At most, the FMLA addresses the limitations of the model of formal equality in the areas of pregnancy and childbirth by requiring employers to provide women with job security when they must be absent from work for the immediate, physical event of childbirth and its aftermath, including a relatively short period to recover and bond with a newborn. Thus, the FMLA does little more than round out Title VII's protections in the limited area of pregnancy, solving the problem of formal equality mainly for privileged women where the PDA fell short. As the following table demonstrates, still unaddressed by Title VII, the PDA, or the FMLA, are women's work/family conflicts that result from their cultural caregiving work.

302. A&P Hearings, H.R. 2020, at 12 (1985) (testimony of Wendy Williams).

TABLE

THE EFFECTIVENESS OF EMPLOYMENT DISCRIMINATION LAW IN ELIMINATING WORKPLACE DISCRIMINATION AGAINST WOMEN
ON THE BASIS OF THEIR FAMILY CAREGIVING WORK AND IN OVERCOMING TITLE VII'S MAJOR THEORETICAL LIMITATIONS

EMPLOYMENT DISCRIMINATION LAWS/ THEORIES OF RELIEF	EMPLOYMENT DISCRIMINATION ON THE BASIS OF PREGNANCY/CHILD BIRTH/RECOVERY		EMPLOYMENT DISCRIMINATION ON THE BASIS OF WOMEN'S CULTURAL CAREGIVING	
	TITLE VII'S MAJOR THEORETICAL LIMITATIONS			
	<i>Categorical Framework</i>	<i>Formal Equality Model</i>	<i>Categorical Framework</i>	<i>Formal Equality Model</i>
<i>Title VII</i> <i>Disparate Treatment/ Sex-Plus</i>	Mixed results—Lower courts split; Supreme Court ultimately held in 1976 that pregnancy discrimination is not sex discrimination in <i>General Electric Co. v. Gilbert</i> . ³⁰³	N/A; superseded by PDA.	Resolved with regard to hiring/promotion if plaintiff can conform to male-worker norm, e.g., <i>Ida Phillips</i> . ³⁰⁴	Unresolved with regard to demotion and termination, e.g., <i>Teresa Chi</i> , <i>Alicia Martinez</i> , <i>Melissa Fuller</i> , <i>Andrea Bass</i> . ³⁰⁵
<i>Title VII</i> <i>Disparate Impact</i>	Mixed results; some courts hold policies that disproportionately impact pregnant women may violate Title VII, while others find that such policies do not discriminate against women as a class, only pregnant employees. ³⁰⁶ Absence of statistically significant comparative evidence often further limits relief. ³⁰⁷	Mixed results; cannot reach "non policies." See, e.g., <i>Nashville Gas Co. v. Satty</i> . ³⁰⁸ Business necessity defense severely limits relief. ³⁰⁹	Mixed results; some courts hold policies that disadvantage women with family caregiving obligations may violate Title VII, while others find that such policies do not discriminate against women as a class, because all women are not caregivers. ³¹⁰ Absence of statistically significant comparative evidence often further limits relief. ³¹¹	Mixed results; cannot reach "non policies." Business necessity defense severely limits relief. ³¹²
<i>PDA</i>	Resolved. ³¹³	Does not reach. See, e.g., <i>California Federal Savings and Loan Ass'n v. Guerra</i> . ³¹⁴	Does not reach. See, e.g., <i>Maganuco v. Leyden Community High School District</i> 212. ³¹⁵	Does not reach. ³¹⁶
<i>FMLA</i>	N/A; statute is gender neutral.	Resolved for privileged women. ³¹⁷	N/A; statute is gender neutral.	No protection. ³¹⁸

(See Table preceding page)

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303. 429 U.S. 125 (1976).
304. *See supra* Part II.B.1.b.
305. *See supra* Part II.B.1.b.i.–iii.
306. *See supra* note 246 and accompanying text.
307. *See supra* notes 247–49 and accompanying text.
308. 434 U.S. 136, 144–45 (1977); *see also supra* note 233 and accompanying text.
309. *See supra* Part II.B.2.
310. *See supra* note 246 and accompanying text.
311. *See supra* notes 247–49 and accompanying text.
312. *See supra* Part II.B.2.
313. *See supra* Part II.B.1.a.
314. 479 U.S. 511 (1987); *see also supra* note 129 and accompanying text.
315. 939 F.2d 440 (7th Cir. 1991); *see also supra* notes 139–56 and accompanying text.
316. *See supra* notes 139–56.
317. *See supra* Part II.C.
318. *See supra* Part II.C.

In summation, current protections for women's disproportionate caregiving within the family, insofar as these responsibilities conflict with their ability to work for wages, are limited to two different statutory enactments, neither of which provides adequate support for the most common leave needs of caregivers, who typically are women. The model of formal equality and the categorical framework on which Title VII is based have made it difficult for women to gain accommodations in the workplace for their cultural caregiving, under either a disparate treatment or disparate impact theory of discrimination. The PDA provides only limited protections for the physical and immediate events of pregnancy and childbirth. The PDA does little to address the issue of women's most common caregiving responsibilities. Title VII's sex-plus theory has served women only to the extent that they can demonstrate that their family obligations will not interfere with their wage work. This has rendered Title VII moderately successful at facilitating women's entrance into and advancement in the workforce, but distinctly unable to ensure women job security such that their attachment to the workplace is protected. Disparate impact theory possesses only a limited ability to address employer inaction, a major source of harm to women who have significant caregiving obligations. Further, plaintiffs attempting to use this theory have been hindered by insurmountable problems of proof and the formidable business necessity defense. Under the FMLA, women receive limited, unpaid job protection for instances when they or their family members are incapacitated due to pregnancy, childbirth, or serious illness. But women's typical caregiving responsibilities, *i.e.*, caring for young but healthy children or elderly but not seriously ill parents; dealing with minor family illnesses; cooking and cleaning; transporting children or parents to routine medical appointments; and coping with unexpected family emergencies—all the work that women disproportionately and invisibly perform within the family—does not even register as a blip on the radar screen of the American legal system. While feminism as well as global economic changes have had the result of ending the exclusion of women from the workplace, the transformation of the male-centered norms that structure the workplace beyond a minimal concession to women's experiences of pregnancy and childbirth has yet to be achieved.

III. ROOT CAUSES: THE LIMITS OF LIBERAL AND ECONOMIC THEORY

A gap between a law's reach and the aspirations of those who seek to use it to accomplish substantial societal reform is a common enough phenomenon, but this is small consolation, and critics look for explanations.

—Katharine T. Bartlett,

*Only Girls Wear Barrettes: Dress and Appearance Standards,
Community Norms, and Workplace Equality*³¹⁹

This section seeks to explain the inability of the current legal framework to recognize and accommodate women's cultural caregiving work as it impacts their labor force attachment. I propose that the liberal and neoclassical economic theories that dominate our law have dictated the limited response to the conflict between women's private nurturing responsibilities and their wage work. There is now a great wealth of literature critiquing the assumptions of liberal legal and law and economic theory, both by feminist and other critical legal scholars. Among the tenets of liberal theory that have been examined exhaustively are autonomy, neutrality, privacy, and equality. For example, critical legal theorists and communitarians in particular have criticized the liberal ideal of autonomy as producing legal regimes that romanticize individualism, contribute to mass societal alienation, and ignore the value of social connection.³²⁰ Feminist legal theorists have critiqued the liberal ideal of autonomy as failing to account for women's fundamental existential conditions of connectedness and interdependence, resulting in laws that either ignore or actually harm women.³²¹ Similarly, the

319. Bartlett, *supra* note 107, at 2542.

320. For the classic communitarian critiques, see LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998); CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* 187–210 (1985); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975).

321. Among the feminist critiques are Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); West, *supra* note 40. Elizabeth Fox-Genovese's *FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM* (1991) provides a parallel critique outside of law. For a feminist critique of the feminist critique, see Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1174 (1992) ("[T]he feminist critique of liberalism as presenting an

"neutral state,"³²² that is, the assertion that because no person's definition of "the good" can be presumed to be better than anyone else's, the state must act as a neutral arbiter of competing visions, has been critiqued by outside legal scholars. Among the critics of the neutral state are the "comprehensive liberals" who believe, *inter alia*, that the state has an affirmative obligation to promote the "good life."³²³ Similarly, feminist legal theory and methodology, at their core, are premised on a challenge of the "neutral" state.³²⁴ As Martha Albertson Fineman has plainly put it, "Neutral treatment in a gendered world or within gendered institutions does not operate in a neutral manner"³²⁵ So too has liberalism's assertion of the sacred realm of the private sphere into which the state must not intervene, *i.e.*, the "public/private split,"³²⁶ been questioned. At the forefront of this critique have been feminist legal theorists³²⁷ who

atomistic and unconnected conception of the person attacks a caricatured picture of liberalism.").

322. For examples of the proponents of state neutrality, see BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) (arguing for the constraint of "neutral dialogue"); BRIAN BARRY, *JUSTICE AS IMPARTIALITY* (1995); CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 43 (1987) ("The ideal of neutrality can best be understood as a response to the variety of conceptions of the good life."); JOHN RAWLS, *POLITICAL LIBERALISM* (1993) ("[P]olitical liberalism . . . has to be impartial . . . between the points of view of reasonable comprehensive doctrines."); Brian Barry, *In Defense of Political Liberalism*, 7 *RATIO JURIS* 325, 328 (1994) (describing a principle of "constitutional neutrality" that does not favor any one conception of the good).

323. *E.g.*, WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991) (arguing that liberalism is committed to a distinctive conception of the human good); MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991) (arguing for an "ecumenical" rather than a neutral political dialogue); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) (presenting a perfectionist account of political morality); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 *STAN. L. REV.* 385 (1996) (arguing autonomy is a normative good which the state should promote, not an instrumental good on which the state's false neutrality is premised); Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 *HARV. L. REV.* 1350, 1353 (1991) (defending comprehensive liberalism by showing the gaps in the case for neutrality).

324. Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829 (1990) (setting forth feminist legal methods aimed at exposing the gendered nature of purportedly neutral rules); Ann C. Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard*, 57 *MO. L. REV.* 371 (1992) (same).

325. FINEMAN, *THE NEUTERED MOTHER*, *supra* note 5, at 26.

326. For an exploration of the concepts of public and private within liberal theory, see Stanley I. Benn & Gerald F. Gaus, *The Liberal Conception of the Public and the Private*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 31 (Stanley I. Benn & Gerald F. Gaus eds., 1983); Symposium, *The Public/Private Distinction*, 130 *U. PA. L. REV.* 1289 (1982).

327. For a critique of the public/private distinction from a feminist perspective, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE*, *supra* note 326, at 281, 283 ("[T]he separation and opposition of the public and private spheres is an unequal opposition between men and women.").

have exposed the ways in which concepts of privacy have been used to shield rape and domestic violence from the law's reach³²⁸ and to privatize the cost of caregiving work done by women.³²⁹ Indeed, the feminist critique of the public/private split has left its mark on mainstream liberal legal theorists.³³⁰ Finally, the last two decades have witnessed a thorough critique of liberalism's golden calf of equality. The modern critique of liberalism's emphasis on equality has not been so much of the concept of equality itself—that is, that like things should be treated alike—but in the courts' failure to see difference where it exists. This has been a major area of feminist legal theory's critique of liberalism.³³¹

For a feminist critique of the feminist critique, see Baldwin, *supra* note 31, at 48 (arguing that feminist accounts of women's lives have suppressed their public experiences, thereby "foreshorten[ing] the horizon line of feminist demands for public reform").

328. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 5, at 177–98 (identifying privacy's failure to protect nontraditional families from the state and its tendency to cloak violence against women and children within the traditional family); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 57–85 (2000) (tracing constitutional attacks on the Violence Against Women Act (VAWA) on federalism grounds to age old concepts of public and private spheres); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991) ("The concept of freedom from state intrusion into the marital bedroom takes on a different meaning when it is violence that goes on in the marital bedroom.").

329. See Abrams, *supra* note 216, at 1224 ("Most employers view the present boundary between work and family as a natural feature of the workplace, thus making the conflict a problem for parents alone."); Dowd, *Gender Paradox*, *supra* note 64, at 133 (arguing that focusing on workplace reforms to the exclusion of the family sphere may serve to reinforce the public/private distinction that underlies the discriminatory structure of work); Dowd, *Restructuring Work*, *supra* note 299, at 469 ("The primary role of the law in the work-family relationship has been non-intervention . . ."); Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 158 (1998) ("[I]n the area in which work-and-parenting issues intersect, parenting issues are . . . bracketed as domestic and therefore inappropriate for intervention in the work sphere . . ."); Martha A. Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 955–56 (1991) (criticizing current doctrine of family privacy for protecting only traditional nuclear families); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1120 (1986) ("The public-private dichotomy is entrenched in and fostered by our legal system . . . illustrated by the judicial tolerance of excluding pregnancy from disability or other benefit plans, by the fact that women still can be legally fired from certain jobs when they become pregnant, by the difficulty pregnant women or new mothers have in some states in obtaining unemployment compensation, and by the general lack of adequate pregnancy and maternity leave and benefit policies in this country.").

330. See, e.g., John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 791 (1997) ("[T]he principles of justice enjoining a reasonable constitutional democratic society can plainly be invoked to reform the family.").

331. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 50–74, 219 (1990) (deconstructing the limited and limiting assumptions about difference in mainstream legal theory); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 306–09 (1989) (summarizing relational feminist scholarship of the 1970s and 80s); WEST, *supra* note 35, at 100 ("Women sustain *physical, emotional, psychic* and *political* harms in daily life—indeed, for many women, on a daily basis—which have no or little counterpart in

Critical legal scholars also have questioned the foundational assumptions of homo economicus, on which neoclassical economic theory and Law and Economics rest. Among the foundational elements of Law and Economics that have been subjected to scrutiny is rational choice theory, which goes beyond liberalism's assumption that all individuals are rational decision makers to assert that individual rational decisions always benefit the decision maker, *i.e.*, utility maximization.³³² In fact, "objections to the rational actor model in Law and Economics are almost as old as the field itself."³³³ While not addressing Law and Economics or rational choice theory in particular, recent works employing Freudian and cognitive psychology to examine sex and race discrimination also represent challenges to the rational actor model.³³⁴ Feminist legal theory has exposed the manner in which the rhetoric of choice has been used to deny women public subsidies and legal protection from institutional and familial harm.³³⁵ Finally, critical scholars, including feminist legal theorists, have called into question the alleged neutrality of the market,³³⁶ and the assumption within Law

men's lives."); Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 66 (arguing for equal treatment except during periods when women engage in uniquely female experiences such as pregnancy, menstruation, and rape); Krieger & Cooney, *supra* note 43, at 517; Law, *supra* note 43, at 1007-13 (arguing for equal treatment except in areas relating to reproduction); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (arguing that all sexual differences should be made "costless"); West, *supra* note 40, at 14-18 (arguing that all modern American legal theory is "masculine" in that it ignores the fundamental difference of women's interconnectedness); *cf.* CATHARINE A. MACKINNON, *SEX EQUALITY* (forthcoming 2001) (page proofs at 4-24, on file with author) (critiquing mainstream "Aristotelian" equality thinking for its preoccupation with sameness, while also questioning whether the recognition of difference is an appropriate theoretical solution).

332. Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 385.

333. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998) (collecting citations).

334. See, e.g., Krieger, *supra* note 136 (arguing that much discrimination is a result of unintentional categorization-related judgment errors characterizing normal cognitive functioning); Lawrence, *supra* note 136 (arguing that most discrimination is a result of unconscious racism of which the discriminator has no awareness due to denial).

335. Contemporary feminist critiques of choice include Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990); Finley, *supra* note 65, at 931-40; Robin West, *Colloquy: Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1455-56 (1986); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

336. Through the aggregation of decisions, the market according to economic theory is the mechanism that allows the self-interest of human beings to operate to the benefit of the collective. As such, the market in Law and Economics is akin to the neutral state underlying liberal theory—both are seen as the only fair mediator of endless conflicting desires. See sources cited *supra* note 322. This is, of course, the essence of Adam Smith's "Theorem of the Invisible Hand":

and Economics that the goal of law, above all others, should be to promote efficiency.³³⁷

The law's failure to address the conflict between women's work and family obligations is arguably a function of each of these assumptions. As the preceding discussion demonstrates, the project of exposing the manner in which these assumptions have contributed to the law's stunted ability to address women's needs for accommodation in the workplace already has begun.³³⁸ Recounting each of these critiques in detail is beyond the scope of this Article. However, our law's foundational tenets of autonomy, equality, and rationality will be revisited here to make a specific argument about the law's inability to recognize women's cultural caregiving. I suggest that the liberal and neoclassical economic theories which so greatly influence our law, including our discrimination laws, are unable to account for women's experiences that are culturally

The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.

ADAM SMITH, *THE WEALTH OF NATIONS* 423 (The Modern Library, New York 1937) (1776). Classic Critical Legal Studies' critiques of the alleged neutrality of Law and Economic analysis include MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 126 (1987) ("Law and Economics really is conservative ideology . . .") and C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 4 (1975) (noting the conservative ideology in Chicago school of law and economics). A powerful feminist critique is set out in Robin West's *CARING FOR JUSTICE*, *supra* note 35.

337. See, e.g., KELMAN, *supra* note 336, at 121 (noting that, as an empirical matter, efficiency only benefits society *on average, in the aggregate, and over time*, but there will always be individual winners and losers even within a perfectly efficient legal regime); Ann Laquer Estin, *Can Families Be Efficient: A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1, 33 (1996) ("Feminist theorists cannot use or accept efficiency-based arguments for family policy, because they are based on a descriptive theory premised on the continuation of the traditional gender system in marriage and in the world outside the family sphere."); Fineman, *supra* note 37, at 21 n.15:

[T]he . . . "efficiency and exploitation" model . . . is really nothing more than the assertion that if women allow themselves to be exploited as unpaid or underpaid caretakers, that is then the most efficient resolution for the problem of caretaking and dependency and should not be disturbed. Aside from the fact that this arrangement is not working and that it results in massive poverty and other social ills, this type of argument demonstrates how little economics has to offer to considerations of justice.

See also Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115, 121 (1999) (criticizing neoliberalism's embrace of efficiency at the expense of equitable distribution).

338. See *supra* notes 320–34.

based. By cultural, I mean those aspects of women's lives that are understood to be the product of gender socialization, not biological forces. Caregiving, which women disproportionately perform but which men are also capable of performing, is just such a cultural experience, at least according to modern social scientific theory.³³⁹

This prevailing view, of course, grew in large part out of modern feminism's challenge to the historical conception of women as biologically unsuited for wage labor or public participation.³⁴⁰ The popular understanding that women's caregiving is attributable to gender socialization, not biological difference, can also be traced to the link between the Civil and Women's Rights Movements. Sex discrimination law grew out of the Civil Rights Movement, which was grounded upon the theory that all humans are inherently the same and thus deserving of the same liberties, rights, and privileges of citizenship.³⁴¹ At the core of the rejection of racial segregation were the powerful notions that blacks are fundamentally the same as whites, and that it is irrational for surface differences such as skin color to carry any significant meaning.³⁴² Thus, the modern Civil Rights Movement rested on a showing that racism was socially constructed. The belief that discrimination was due to irrational prejudice or historical disadvantages that grew out of irrational prejudice was a means of overcoming powerful dehumanizing ideas about blacks' natural or biological inferiority which were the basis for treating them as chattel, the very root of slavery.³⁴³ Sex discrimination law grew out of this scheme as a prac-

339. See sources cited *supra* note 22.

340. "Protective legislation" common in the late nineteenth and early twentieth centuries relied on a vision of women's biological frailty to justify the forced exclusion of women from employment 1) in certain professions, *e.g.*, *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding restrictions on women tending bar); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding restrictions on women practicing law); 2) at certain hours, *e.g.*, Act No. 466 Pa. Laws (1913) (restriction on night work for women); or 3) for particular numbers of hours, *e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state law prohibiting employment of women more than ten hours a day). The "protection" of women out of certain professions and public endeavors continued into the latter part of this century. *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding the requirement that prison guards be male as a bona fide occupational qualification under Title VII); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding male-only draft as constitutional).

341. JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971) ("[I]nstitutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties . . .").

342. Actually, the distinction between slaves and non-slaves was based on "blood," not skin color, ensuring that even blacks who looked white would be subjected to slavery. F. JAMES DAVIS, *WHO IS BLACK?* 5 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1740 (1993).

343. See, *e.g.*, Franz Samelson, *From "Race Psychology" to "Studies in Prejudice": Some Observations on the Thematic Reversal in Social Psychology*, 14 J. HIST. BEHAV. SCI. 265 (1978)

tical strategy among feminists working to include women within the existing model of formal equality underlying civil rights laws.³⁴⁴ As with race, this political strategy was consistent with a developing consensus among anthropologists, sociologists, and psychologists that sex differences were illusory and not the proper basis for differential treatment.³⁴⁵

While the "social construction" story underlying the women's rights movement of the 1960s and 1970s and our present sex discrimination laws made limited gains in breaking down the family wage and separate-spheres doctrines, I contend that it is incapable of fundamentally challenging certain aspects of liberal and neo-classical economic theory which form the basis of our law and which continue to perpetuate the labor force attachment gap between men and women. The concepts of autonomy, equality, and rationality which form the foundation of our law have the peculiar ability only to recognize women's immutable biological differences from men, leaving women's cultural caregiving beyond the law's reach. This explains, in part, the limited ability of Title VII, the Pregnancy Discrimination Act, the Family and Medical Leave Act, and judges interpreting these statutes, to recognize much beyond women's immediate, physical experiences of pregnancy and childbirth.

(examining the shift in psychology from embracing the idea of racial inferiority to labeling it as irrational bias). "In 1920, most psychologists believed in the existence of mental differences between the races." *Id.* at 265.

344. Feminists' efforts to link sex and race discrimination are exemplified in Justice Ruth Bader Ginsburg's defense of the Equal Rights Amendment to the U.S. Constitution, especially in *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 16-23 (1975), and *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 474-75 (1978); in Pauli Murray's strategy papers and legal memoranda written in an effort to get sex added to Title VII, see Becker, *supra* note 91, at 223-25, 234 (1998) (citing, *inter alia*, PAULI MURRAY, THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET 356-57 (1987)); in *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), the first Supreme Court decision to explicitly discuss the standard of review appropriate in sex discrimination cases brought under the Equal Protection Clause ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . ."); and in the court record of *Phillips v. Martin Marietta*, the first Title VII case ever to reach the Supreme Court, discussed in Part II.B *supra*. See Chamallas, *supra* note 219, at 341-47 (noting that the Phillips case was jointly litigated by NOW, NAACP, and ACLU, and that the lawyers for Ida Phillips were successful, in large part, because they analogized sex and race discrimination).

345. See CYNTHIA FUCHS EPSTEIN, WOMEN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS (1970); MARGARET MEAD, SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES 205-06 (1935); John Stuart Mill, *The Subjection of Women*, in ESSAYS ON SEX EQUALITY 123-242 (Alice S. Rossi ed., 1970). While Mill's writings preceded the modern consensus about the origins of men and women's sex-roles by a half a century, his forward-looking writings on women were resurrected in a number of primers on feminist theory in the 1970s.

Before proceeding, it is important to make clear that I am not intending to argue that women's biological difference should be the basis for workplace accommodation, though, unlike the formal equality position, I do not deny that there are real differences between the sexes that are relevant to law. Rather, my ultimate point will be that even the "social construction" story of women's caregiving, at least as it has been marshaled by many feminist theorists, represents an acceptance of the premises underlying the biological inferiority model that has been so widely criticized. Both rely on a depiction of constrained agency, thereby failing to challenge the dominant framework that provides support only for "innocent" actors who have little control over their predicament. My assertion that the law as currently constructed respects only biological difference is thus a descriptive, not a normative, endeavor.

A. Autonomy

As other commentators have highlighted, the assumption within both liberal and economic theory that humans are individuals first, that "what separates us is epistemologically and morally prior to what connects us,"³⁴⁶ has formed the basis for the model worker on which the workplace is structured.³⁴⁷ That "ideal worker," as Joan Williams has identified him, is an individual unencumbered by childcare or other nurturing responsibilities.³⁴⁸ This ideal worker is available for work at least forty hours a week and has no need for even intermittent time off to care for sick children, much less for more substantial leave to deal with the physical limitations of pregnancy and childbirth, to raise infants and young children, or to care for elderly relatives. The limited protections of Title VII and the FMLA, while representing an acknowledgment of the falsehood of the ideal worker, at the same time reinforce that ideal through their cramped definitions of the circumstances when a worker is encumbered. Both statutes, at bottom, only recognize

346. West, *supra* note 40, at 2. Robin West was paraphrasing political philosopher Michael Sandel's assertion that "[w]hat separates us is in some important sense prior to what connects us—epistemologically prior as well as morally prior. We are distinct individuals first, and then we form relationships and engage in co-operative arrangements with others; hence the priority of plurality over unity." MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 133 (2d ed. 1989).

347. See, e.g., Abrams, *supra* note 216, at 1221–22; Dowd, *Gender Paradox*, *supra* note 64, at 100–01; Dowd, *Restructuring Work*, *supra* note 299, at 466; West, *supra* note 40, at 2; Williams, *supra* note 15, at 822.

348. Williams, *supra* note 15, at 822.

biological conditions: pregnancy, childbirth, and serious illness—and this recognition was achieved only after two decades of legislative advocacy and litigation.³⁴⁹ Put simply, the powerful notions of the autonomous individual have worked to define biological incapacity as the outer limit of cognizable dependence within the current legal scheme.

B. Equality

The embeddedness of the concept of equality within our legal system—particularly the peculiar form of formal equality that has dominated judicial decision making over the past decade³⁵⁰—is a primary source of the law's failure to recognize the conflict between women's work and family responsibilities. The ideal of equality, that like things should be treated alike, is a fundamental concept underlying our liberal legal system. That similarly situated persons or groups of persons should be treated similarly is the goal of the equal protection clause of the Fourteenth Amendment.³⁵¹ This notion of equality is similarly at the heart of Title VII's prohibition of sex discrimination. The feminist critique of equality has been not of the concept of equality itself—that like things should be treated alike—but of the failure of legal decision makers to see difference where it exists.³⁵² As the feminist critique highlights, the process of classification is a precondition of equality analysis. For, if justice requires that like things be treated alike, the object of the law must be categorized in order for the law to function justly.

Viewed through the categorical lens of equality analysis, women's nurturing poses a difficult problem for the law. Because

349. See *supra* Part II.

350. See, e.g., *Bush v. Gore*, 121 S. Ct. 525, 530 (2000) (overturning court ordered manual recounts in contested presidential election); *Rice v. Cayetano*, 528 U.S. 495 (2000) (invalidating racially conscious voting qualification system for trustees of state minority affairs office); *Bush v. Vera*, 517 U.S. 952 (1996) (invalidating racially conscious redistricting plan); *Miller v. Johnson*, 515 U.S. 900 (1995) (same); *Shaw v. Reno*, 509 U.S. 630 (1993) (same); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (overturning school desegregation plan); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (striking down minority preference system in government contracts); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (same); *Hopwood v. Texas*, 78 F.3d 932 (1996) (rejecting racially conscious law school admissions program). Recent critiques of the Supreme Court's equality jurisprudence can be found in Symposium, *Discrimination and Inequality: Emerging Issues*, 85 CORNELL L. REV. 1181 (2000).

351. The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

352. See sources cited *supra* note 331.

the caregiving that women disproportionately perform is defined within the dominant discourse as a cultural, not a biological, phenomenon, it is difficult, if not impossible, for the law to recognize. Cultural differences are "more or less" differences, as Christine Littleton has described them,³⁵³ *i.e.*, those experiences that are generally but not always true for women. Women's disproportionate responsibility for the care of dependents is such a "more or less" difference. Put simply, because not all women are necessarily caregivers, and because men can and do nurture others, even if such nurturing is the exception, the law is unable to equate nurturing with women and thus to recognize discrimination on the basis of nurturing responsibilities as sex discrimination. This phenomenon has also been called the problem of the "perfect proxy": because caregiving is not a perfect proxy for the female sex, discrimination on the basis of caregiving is not considered sex discrimination.³⁵⁴ As demonstrated in Part II.B., Title VII is plagued by this flaw and the sex-plus theory of discrimination has not successfully overcome it.

Feminists are deeply divided over whether seeking the law's recognition of women's differences detracts from women's equality, or is a necessary precondition to it. Some feminist legal scholars have cautioned against celebrating or accommodating women's differences from men, whether biological *or* cultural, since difference has always meant women's difference and historically has provided the basis for treating women worse as well as better than men.³⁵⁵ Other feminist legal scholars have opposed celebrating women's gender specific experiences, because those experiences have been constructed and limited by patriarchy.³⁵⁶ Still other feminist legal theorists argue for accommodation, but only with regard to biologically-based differences such as pregnancy, menstruation, or rape.³⁵⁷ Feminist theorists and legal advocates for women have been hesitant to urge accommodation of strictly cultural differences for

353. Christine Littleton distinguishes between "more or less" and "yes or no" differences in *Reconstructing Sexual Equality*, *supra* note 331, at 1324-28.

354. Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449-50 (2000).

355. *See id.* at 1477-78; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196-200 (1982); Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99.

356. *See, e.g.*, Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32 (1987).

357. *E.g.*, Kay, *supra* note 331, at 81-87 (arguing for equal treatment except when women experience uniquely female phenomena such as pregnancy, menstruation, and rape); Krieger & Cooney, *supra* note 43, at 517 (arguing for the accommodation of pregnancy in the workplace); Law, *supra* note 43, at 1007-13 (arguing for equal treatment except in areas relating to reproduction).

fear of essentializing women's experiences and reinforcing gender roles which have served to harm women.

However, even if feminists could come to a consensus around a strategy that seeks recognition of women's cultural differences—and many have noted that, at least within the academic literature, such a consensus is beginning to develop³⁵⁸—the foundational tenet of equality underlying the dominant liberal legal framework will pose a major impediment to gaining legal recognition of women's nurturing work, which is a “more or less” difference. In other words, the law's inability to recognize women's caregiving is a fundamentally theoretical problem, as well as practical one. This presents a far greater challenge for feminist legal theorists than the current understanding of the predicament would imply. For, even if we could “[s]top fighting each other!”³⁵⁹ as Joan Williams has recently implored, the categorization problem of equality theory on which our discrimination laws are founded presents an insurmountable epistemological obstacle to gaining accommodations for women's cultural experiences.

Title VII, the PDA, and the FMLA plainly manifest this limitation of equality theory and thus our law. Women whose employers discriminate against them on the basis of their cultural differences from men have received uneven protection from Title VII under either the sex-plus or disparate impact theory of discrimination.³⁶⁰ The PDA provides for accommodation of women's family caregiving experiences in the workplace only to the extent that those experiences are rooted in the biologically unique phenomena of pregnancy and childbirth.³⁶¹ Moreover, even this limited accommodation of biological difference is only available to the extent that an employer also provides leave for comparable biological disabilities that are not sex-based—that is, to the same extent that men are covered.³⁶² Similarly, while the FMLA makes some provision for women's nurturing experiences, it too is focused on a biologically-based conception of women's nurturing. The twelve weeks of leave is modeled largely on a medicalized conception of childbirth, not parenting, both in its limited duration and in the requirement that it be taken all at once.³⁶³ That men are also permitted to take “family leave” belies the primary target of the Act:

358. E.g., Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 279 (1998).

359. *Id.* at 319.

360. See *supra* Part II.

361. See *supra* notes 139–57 and accompanying text.

362. See *supra* notes 139–57 and accompanying text.

363. See discussion *supra* Part II.C.

the physical experience of childbirth, but not the cultural experience of caregiving.³⁶⁴ Thus, Title VII, the PDA, and FMLA demonstrate the limits of using formal equality theory to address the conflict between work and family experienced by women. Because women's caregiving is not an "all or nothing" immutable biological difference, our employment antidiscrimination laws possess a limited ability to recognize it.

C. Rational Choice Theory

The law's limited response to the conflict between women's disproportionate responsibility for caregiving and their wage work can also be attributed to the influence of the Law and Economics movement, which exploded into prominence in the 1980s.³⁶⁵ Law and Economics is diverse in theory and perspective: there are the Chicago and New Haven Schools, the Public Choice wing, first and second generations, and so on.³⁶⁶ Yet, common among these perspectives has been an embrace of rational choice theory, which has greatly influenced employment discrimination law.³⁶⁷ Rational choice theory hypothesizes, first, that human beings always are motivated by self-interest, that they are "utility maximizers."³⁶⁸ Second, it assumes that all human behavior is a result of rational decision making.³⁶⁹ In its most simplified form, rational choice theory posits that a person, in deciding to engage in any particular behavior, compares the costs and benefits of the action.³⁷⁰ If the benefit exceeds the cost, she will engage in the activity; she will refrain if the reverse is true.³⁷¹ By definition then, according to rational choice theory, if a person engages in an action, it is in her self-interest. If it were not, she would not have acted.³⁷² "If consent can be

364. Furthermore, the FMLA's leave provisions for nurturing responsibilities other than childbirth only cover time needed to attend to family a member's "serious illness." While women are disproportionately responsible for the care of those who are ill, their responsibilities encompass infinitely more tasks than dealing with medical emergencies.

365. See Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 604-14 (1989).

366. *Id.*

367. See RICHARD POSNER, *AN ECONOMIC ANALYSIS OF LAW* 19-22 (1992) (summarizing the history and growing influence of Law and Economics theory).

368. See *infra* note 372.

369. See *infra* note 372.

370. See *infra* note 372.

371. See *infra* note 372.

372. The foregoing is largely based on Thomas Ulen's summary of rational choice theory set out in *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 457:

observed, the benefit can be inferred, even if we do not understand the reasons for the transaction ourselves."³⁷³

Rational choice theory does have outer limits, however. There are circumstances when even traditional economic theory, and our law which has been so greatly influenced by economic concepts, recognize that a person is not acting of her own free will. The traditional circumstances are narrowly defined as those where an actor's agency is impaired by physical or psychological factors outside of her control. As expressed in contract and criminal law, for example, force, fraud, duress, incapacity, and "heat of passion" are commonly recognized defenses to liability.³⁷⁴ Short of these limited conditions, our law presumes the actor is squarely situated within the rational choice model. As Richard Epstein has stated, "The exchange need only be monitored [by the law] . . . to ensure that force and fraud and incompetence are not involved. When those minimum conditions are satisfied, then the consent of both parties guarantees that the transaction works to their common benefit."³⁷⁵

Viewed through the lens of rational choice theory, women's cultural caregiving is a mere choice, for which the state owes no support and employers owe no accommodation. Perhaps the most often cited evidence of this reasoning can be seen in *Equal Employment Opportunity Commission (EEOC) v. Sears Roebuck & Co.*,³⁷⁶ in which Sears successfully argued as a defense to a Title VII discrimination case that its female employees voluntarily "chose" low-paying, noncommissioned sales jobs so as to facilitate their family responsibilities.³⁷⁷

Recall the bare bones of rational choice theory. Decision-makers are rationally self-interested; they have complete, transitive, and reasonably stable preferences; they can learn about and compute the costs and benefits of alternative courses of action; and they seek to maximize as many of their preferences as they feasibly can. Where the outcomes of current action lie in the future, rational actors compute the probability of the various outcomes, evaluate the utility to them of those outcomes, and choose that action that promises the maximum expected utility.

373. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 26 (1992).

374. See 17A AM. JUR. 2D *Contracts* §§ 23 (capacity required to form a contract), 234 (duress, coercion, intimidation invalidates contract) (1991); 21 AM. JUR. 2D *Criminal Law* §§ 34-36 (capacity required for criminal liability), 160-67 (coercion/duress constitutes defense) (1998); 40 AM. JUR. 2D *Homicide* §§ 49, 241 ("heat of passion" is a mitigating factor) (1999).

375. EPSTEIN, *supra* note 373, at 25.

376. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

377. For a discussion of the Sears case, see Schultz, *supra* note 65, at 1840-41 (analyzing fifty-four federal sex discrimination cases from 1972 to 1989 in which the issue of choice was raised, including the Sears case); see also Williams, *supra* note 335, at 1608.

In contrast, rational choice theory does have a limited ability to recognize women's biological differences, which are viewed as irrevocably bound-up in nature and beyond women's control. While women often "choose" to become pregnant, once this choice is made—even if we assume that all pregnancies are desired, which clearly they are not—short of abortion, women cannot "choose" to avoid birth. Understood in this way, the PDA and FMLA can be explained as examples of limited but traditional exceptions to the model of personhood that is at the heart of rational choice theory. Both statutes are focused on women's biological differences from men, despite the FMLA's gender neutral language and provisions for "parental" leave.³⁷⁸ Each represents a grudging recognition that women's experiences of pregnancy and childbirth—childbirth really—cannot be accommodated within a legal system and society so invested in the concept of the rational decision maker.³⁷⁹ In such a world, women's other caregiving experiences, even those with a biological component such as breast feeding, to say nothing of the basic day-to-day care of children and other dependents, are defined as a choice undeserving of the law's recognition.

D. Summary

In summary, the foundational tenets of liberal and economic theory, particularly the concepts of autonomy, equality, and rational choice, have served to render women's caregiving responsibilities nearly invisible within the current legal framework. First, the assumption underlying both liberal and economic theory that humans are autonomous, unencumbered actors has formed the foundation for the current structure of the workplace, which is modeled on a worker who has no caregiving responsibilities. Second, equality theory possesses only a limited ability to recognize cultural differences such as women's caregiving, for the simple reason that such "more or less" differences between men and women escape categorization as sex-based classifications. Third, the influence of rational choice theory has served to construct women's caregiving, not only as a freely chosen endeavor, but one which by definition is assumed to benefit women.

378. See discussion *supra* Parts II.B.1.a., II.C.

379. Normal pregnancy has been deemed by both administrative and judicial decision makers beyond the reach of the FMLA. See discussion *supra* note 295.

Of course, the constructs of autonomy, equality, and rational choice are just that—constructs. Constructs are just ideas, after all. They must live in the world with real people, with real women. While theoretical constructs have a tenacious ability to resist contradictory information, particularly when those constructs are controlled by those who benefit from them, even the most powerful theories must reckon with blatant, existential phenomena to the contrary. Upon Christopher Columbus' safe return from his voyage, the prevailing theory that the earth was flat no longer could be maintained. In the same way, women's unique biological experiences of pregnancy and childbirth—particularly childbirth—are “in your face” phenomena that cannot be maintained within the prevailing theoretical constructs undergirding our employment discrimination law. In contrast, the myth of autonomy, the limits of equality analysis, and the culturally-privileged account of the rational actor render women's gender-based caregiving experiences invisible and beyond the law's reach. Thus, while our legal system has yet to acknowledge women's cultural caregiving as it affects their workforce participation, it has produced limited job protections for women to the extent that the strictly biological conditions of pregnancy and childbirth limit their wage work. Title VII, the Pregnancy Discrimination Act, and the Family and Medical Leave Act are able to perceive circumstances when women are not in fact autonomous, rational, or equal to men, but those circumstances are limited, in the words of the judge who denied parenting leave to Michele McNill, to the moment of “parturition,”³⁸⁰ when a woman is literally connected to human life and utterly and totally overtaken by nature. Our country's employment laws protect women from workplace discrimination only to the extent that their agency is impaired due to physical factors outside of their control.

IV. FEMINISM'S RESPONSE

The constraining effect of liberal and economic theory on the law has received a great deal of attention from feminist legal theorists. As discussed in Part III, feminist theorists have critiqued the elemental constructs underlying these predominant jurisprudential movements in an effort to show how they represent an androcentric conception of humanity and limit the law's ability to address the conflict between women's work and family obliga-

380. *McNill v. New York City Dep't of Corr.*, 950 F. Supp. 564, 569 (S.D.N.Y. 1996).

tions.³⁸¹ These responses can be categorized into two general themes, one which has been significantly more popular than the other. The first response is that women are neither autonomous nor rational decision makers, because biological forces dictate the inevitability of their role as nurturers. I call this the "story of biology." Robin West's work provides an example of such a strategy,³⁸² though she is not alone.³⁸³ According to West:

[T]he biological relationship *of the mother to the newborn* is radically different from that of the father First, the mother, but not the father, is necessarily physically *there* when the baby is born. And second, the mother, but not the father, will lactate, and if she is to avoid painful engorgement of her breasts, will breast-feed. A newborn baby instinctually knows how to breast-feed and knows from which parent to do so. From the baby's birth, the mother is physically connected, and remains physically connected, to the baby in ways which are not true of the father, simply by virtue of physical proximity and her ability to lactate. Mothers are more inclined to nurture their children, perhaps, *in part* simply because they are necessarily physically proximate and universally capable of doing so from the beginning of life.³⁸⁴

The story of biology has received little attention as a transformative device among feminist legal theorists, largely because of the history of discrimination against women on the basis of their perceived biological weakness.³⁸⁵

In contrast, the prevailing response to the rhetoric of autonomy and choice is that women are neither autonomous nor rational decision makers, because gender socialization greatly influences their decisions to take on caregiving responsibilities. I call this the "gender socialization story." A related cousin of the gender

381. See *supra* Part III.

382. WEST, *supra* note 35, at 117.

383. E.g., Greenberg, *supra* note 134, at 230 ("According to the court, the biological consequences of pregnancy . . . do not include a period of time at home with a newborn What about the physical changes that come with lactation or the suppression of lactation? Are they not medical conditions related to pregnancy? What about the psychological changes of the postpartum period and of bonding with a newborn?"); Kovacic-Fleischer, *supra* note 276, at 392 ("Presumably society does not want to discourage all women from having children, nor should women be made to feel that they must give up natural biological functions, such as having children and breastfeeding, in order to work.");

384. WEST, *supra* note 35, at 117; see also *id.* at 14 ("We can hardly . . . simply rul[e] out of bounds by fiat the existence and relevance of the natural world, both around us and within us, *in toto*.").

385. See *supra* note 340 and accompanying text.

socialization story is that of false consciousness, which goes one step further to posit that women are constrained by gender socialization, but, through a process of internalization and denial, believe that they are acting of their own free will. Examples of the story of gender socialization and its false consciousness cousin can be found in the work of countless feminists, both within and outside of law.³⁸⁶

The concept of gender as an organizing principle for understanding women's inequality, as it relates to women's work/family conflicts and in other contexts, has been the yeoman of modern feminism. Most significantly, an understanding of women's caregiving as rooted in gender socialization has successfully contested older conceptions of women as naturally unsuited for public participation and market work.³⁸⁷ Further, the notion of a gendered world successfully contests the highly individualistic, victim-specific conception of who is harmed by sex discrimination. If the harm to women from discrimination is expanded to include all affected by a societal system of gender, then a space is opened for all women to lay some legal claim to protection, even if there are differences

386. *E.g.*, Dowd, *Restructuring Work*, *supra* note 299, at 451 ("While connected to women's biological role of bearing children, the critical role of family is primarily based on women's social role as primary or sole parents."); Fineman, *supra* note 48, at 2 ("The idea of a gendered life is *not* the same as asserting the notion of 'essential' femaleness. The concept of a gendered life is based on the belief that most differences between the sexes are socially manufactured, not inherent."); Littleton, *supra* note 331, at 1292 n.77 ("Asymmetries in areas such as responsibility for childrearing need not, of course, be attributed to nature, but rather to the complex combination of legal, social, and psychological incentives presented to women and men."); Williams, *supra* note 15, at 800 n.11 ("[A] focus on connection is not determined by biology (*i.e.*, sex) but on socialization (*i.e.*, gender)."). Vicki Schultz's work on the "lack of interest" defense in Title VII cases presents an interesting twist on the story of gender socialization, positing that women's employment preferences are molded by a powerful system of workplace socialization. *See* Schultz, *supra* note 65, at 1816. For an example of the false consciousness story, see WILLIAMS, *supra* note 45, at 37 (women confined by the "force field" of domesticity speak of making a choice, when in fact they have internalized domesticity's constraints).

387. *Compare* *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.") (Bradley, J., concurring), *and* *Muller v. Oregon*, 208 U.S. 412, 422 (1908) ("The two sexes differ in structure of body, in the functions to be performed by each . . . in the capacity for long-continued labor . . ."), *with* *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas . . ."), *and* *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) ("Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.").

among them and even if all women have not individually experienced overt sex discrimination.³⁸⁸

Still, I suggest that this latter and widely accepted socialization story has had a limited ability to fundamentally challenge women's work/family conflicts given our legal system's difficulty in recognizing socially-constructed or "cultural" differences between men and women. While an understanding of the "force field"³⁸⁹ that gender exerts upon women may challenge the myth of autonomy, it serves to reinforce women's inability to achieve justice through equality analysis. For, if women's caregiving is simply a socially manufactured predisposition, but not an inevitability, if some men are caregivers and some women are not, then laws that discriminate on the basis of women's caregiving escape categorization as sex-based classifications under equality analysis.³⁹⁰ Moreover, given the crude model of the rational decision maker that now pervades our law, choices constrained by gender socialization are typically not considered sufficiently bounded or coerced to justify protection or accommodation by legal decision makers.³⁹¹ After all, women can just act out of their gender roles. Little short of physical force, whether the force of a gun or the force of Mother Nature, warrants the law's recognition of dependence according to neoclassical economic theory, at least as it has been conceptualized within popular discourse and deployed by legal decision makers. In sum, a theoretical paradigm that rests on an understanding of women's caregiving as a manifestation of culturally constrained agency, while representing a logical strategy to fit women's caregiving into the dominant framework's justifications for accommodation, *i.e.*, biological incapacity, has been and will remain largely unsuccessful as a transformative device against the disciplining aspects of formal equality and rational choice theory.

388. For example, Martha Fineman uses the concept of the "gendered life" to describe women's common "socially manufactured" experiences that can bring together "women across our differences in areas where social and cultural definitions of 'Woman' operate to potentially oppress us all." Fineman, *supra* note 48, at 4; see also Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 36-37 (1990).

389. Joan Williams describes the disciplining nature of gender as a "force field." WILLIAMS, *supra* note 45, at 37-39.

390. See *supra* Part II.

391. See *supra* Part II.

V. IMPLICATIONS FOR THEORY AND LAW

A. Theory

The liberal and neoclassical economic theories on which our antidiscrimination law is based tend to link women's biological differences from men with notions of innocence and incapacity, and to link characteristics that are understood to be culturally based or socially constructed with assumptions of autonomy, rational choice, and responsibility, despite feminists' arguments to the contrary.³⁹² Under this set of assumptions, pregnancy and childbirth receive limited accommodation within the workplace. In contrast, women's cultural caregiving, which is constructed by the theories dominating our law and the culture more broadly as a function of women's free choice or perhaps gender socialization, but certainly not immutable biological difference, is not supported by the state, whether in the form of a comprehensive national insurance system, as in many other countries, or even in the form of less comprehensive workplace antidiscrimination measures.³⁹³

Of course, the suggestion that the law tends to support biological characteristics over which the legal subject is assumed to have little control and to ignore cultural practices over which the legal subject is assumed to have more control contradicts a core premise of equality feminism, that is, that emphasizing differences between women and men—especially biological differences—will lead to sex discrimination.³⁹⁴ But biological characteristics can correspond, and within the employment discrimination context have corresponded, with the law's assumptions of innocence and immutability. Characteristics seen as culturally based or socially constructed can, and with regard to women's nurturing responsibilities have, corresponded with assumptions within the law of agency and responsibility. Thus, as our antidiscrimination laws demonstrate, biological difference can just as easily justify subordination and discrimination as it can accommodation and support. Similarly, cultural difference can just as easily support the decision to withhold the law's protections as it can a theory of nondiscrimination. As such, neither a biological nor a social understanding of women's caregiving—even if it were possible to determine its source—will guarantee women's equality. Rather, the purpose for

392. See *supra* Parts III, IV.

393. See *supra* Parts II, III.

394. See sources cited *supra* note 355 and accompanying text.

which decision makers and the law ignore or acknowledge women's experiences will determine the outcome for women.

So, the question remains: if the law primarily respects immutable biological difference, what should be the response of legal theorists and others working to gain recognition in the law for women's cultural caregiving work? One response has been the suggestion that women's disproportionate caregiving responsibilities are dictated by biological forces.³⁹⁵ While this approach may be logically sound, it fails to fundamentally challenge the prevailing construct, for it simply seeks to include women within the traditionally recognized exceptions of the dominant framework, *e.g.*, duress, coercion, incapacity.

A second response has been the argument that women, actually all human beings, are dependent and therefore worthy of the law's attention. Martha Fineman's work on derivative dependency provides an example of such an approach.³⁹⁶ Fineman's primary point is that dependency is a natural part of human existence—the assertion that certain persons are not dependent, *e.g.*, workers or men, can only be maintained by abstracting such allegedly independent persons from the family and society.³⁹⁷ Second, “those who care for others are themselves dependent on resources in order to undertake that care.”³⁹⁸ Similarly, Joan Williams' concept of the male “ideal worker” whose existence is dependent on the “flow of household work from women” exposes the myth of autonomy and the discrimination against women that result from a workplace structured on such a myth.³⁹⁹ By universalizing dependency, Fineman, Williams, and other feminist theorists⁴⁰⁰ pose a formidable challenge to the myth of autonomy, a corrosive myth which has served to privatize the costs of women's caregiving work and which has precluded the adoption of employment laws that provide for the accommodation of women's caregiving. However, while universalizing dependency successfully contests the myth of autonomy, such an approach may not be sufficient to challenge rational choice theory. For if, as Fineman observes, “derivative dependency [dependency that is a consequence of caregiving] is

395. See *supra* Part III.

396. Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 92–93 (1998); Jeffrey Evans Stake et al., *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 542 (1998) (Martha Fineman presentation).

397. Fineman, *supra* note 37, at 13–15.

398. *Id.* at 20.

399. Williams, *supra* note 358, at 287.

400. *E.g.*, EVA FEDER KITTAY, LOVE'S LABOR 14 (1999).

culturally assigned" to women,⁴⁰¹ unlike biological or "inevitable dependency,"⁴⁰² then according to the rhetoric of choice that pervades our political discourse and judicial decisions, women can simply act out of their culturally-assigned roles as caregivers. Put another way, women can solve their work/family conflicts simply by ceasing the uncompensated "flow" of household labor to men. Indeed, given the failure of men to share equally in caregiving and housework, many women have adopted some formulation of this "strike" solution by delaying pregnancy,⁴⁰³ delegating their caregiving work to relatively disadvantaged domestic workers,⁴⁰⁴ or by forgoing families altogether.⁴⁰⁵ These solutions are fundamentally unjust to women, particularly to the women least able to alleviate the burden of unpaid caregiving work or to negotiate the terms of their employment in the marketplace, and of course, to children. In sum, Williams' ideal worker and Fineman's derivative dependent are powerful rhetorical tools of deconstruction against dominant liberal legal paradigms that currently regulate and construct women's work/family conflicts, particularly the myth of autonomy. But these concepts, alone, cannot address the narrow vision of Law and Economics or the limiting effects of rational choice theory on our law. Nor can the concepts of the derivative dependent or the ideal worker fully challenge the categorization problems inherent in liberalism's commitment to formal equality, for all women are not derivative dependents and all men are not ideal workers.

In making this argument, it is not my intention to deny the complex combination of sociological, biological, economic, and political forces that constrain women's agency when it comes to caregiving. Moreover, it is not a simple matter to overcome socially-assigned gender roles, as the current theoretical framework seems to assume. In fact, as Fineman has pointed out, it may be harder to do so than to overcome biology.⁴⁰⁶ Women have gained control over their unique biological role in reproduction through

401. Stake et al., *supra* note 396, at 542 (Martha Fineman presentation).

402. *Id.*

403. FRANCINE D. BLAU ET AL., THE ECONOMICS OF WOMEN, MEN, AND WORK 281-86 (1998) (describing the "negative substitution effect" of women's labor market earnings on fertility decisions, *i.e.*, as women's potential for market earnings increases, so do the opportunity costs of children, since women bear the bulk of caregiving responsibilities).

404. See *supra* notes 38, 46, 84 and accompanying text.

405. See *supra* note 403.

406. Fineman, *supra* note 48, at 2 ("Changing society is not an easy task. In fact, in some ways it might be *easier* were differences the result of nature or biology. In that instance technology might prove of assistance.").

technological innovation; they have made less progress challenging gender socialization.

Nor can the distortion of women's agency within dominant societal and judicial discourses be discounted. Kathryn Abrams has noted that "women are presented either as fully autonomous choosers (sometimes even manipulative hyperagents) or as wholly compromised victims."⁴⁰⁷ In contrast, the law has adopted a more balanced view of male subjects, recognizing that men sometimes must operate under "context-based restraint" not reflective of some "characterological" defect.⁴⁰⁸ Abrams looks to areas of law where the legal subject is viewed with greater objectivity such as the Uniform Commercial Code provision on unconscionability for paradigms that might challenge the distorted depiction of women as legal subjects.⁴⁰⁹ Uncovering the divergent ways in which the law treats men and women who are constrained by systemic inequality is an important feminist project. For one, such a project, like Fineman's and Williams' work,⁴¹⁰ starts with the assumption of the universal nature of dependency, and thus can challenge liberalism's limiting assumption of autonomy. Second, by focusing on how the law constructs women as legal subjects, Abrams' approach removes from the discussion the decades-old and ultimately irresolvable debate about women's essential nature. Such a disruption in the discourse could open a significant space for alternative theories of inequality, bring women with divergent interests and experiences together, and minimize the spillover costs for women that victories based upon a universal theory of the legal subject often have on other areas of law. If successful, these achievements alone would be substantial.

However, focusing on women's bounded agency, alone, cannot fundamentally challenge the theoretical constructs that so effectively stunt the law's ability to respond to the experience of caregiving. Constraints on agency have been legally cognizable under only extremely narrow circumstances that typically involve physical force, threat of force, or serious psychological impairment.⁴¹¹ While there certainly are exceptions that might prove fruitful for exploration, and while it is not my intention to deny the existence of gender as a powerful operating force on women

407. Kathryn Abrams, *Changing the "Subject" of Inequality* (unpublished manuscript presented at the Feminism and Legal Theory Workshop on Discrimination and Inequality, June 17–19, 1999, Cornell Law School) (on file with author).

408. *Id.*

409. *Id.*

410. See *supra* notes 396–99 and accompanying text.

411. See *supra* note 374 and accompanying text.

and men alike, I suggest that our discrimination law and the theoretical framework that is its cornerstone possess a limited ability to recognize or accommodate decisions constrained by conditions short of brute force.⁴¹² As such, with regard to women's conflicts between work and family, employment discrimination on the basis of biological difference is the primary target of the law. It is clear, then, that refining the theoretical constructs underlying our employment discrimination laws will be necessary before such laws will recognize women's culturally based caregiving work.⁴¹³

One place to start might be to redefine the justifications for accommodation. At present, the primary justifications within our law for accommodating dependency are innocence and immutability.⁴¹⁴ Where a woman is considered to have no responsibility for her predicament and little control over achieving self-sufficiency, within the prevailing construct the law might afford her a limited accommodation to the extent that she can demonstrate that men have received similar dispensations in similar circumstances. Thus, Title VII, the Pregnancy Discrimination Act, and the Family and Medical Leave Act provide women with limited protections from employment discrimination on the basis of their "incapacity" related to childbirth. However, because women's caregiving work is understood to be either a choice or a cultural activity, under the current theoretical framework there exists little justification for restructuring the workplace to account for such work. Thus far, many reformers have approached this dilemma by depicting women's caregiving as a manifestation of constrained agency—either due to biological or sociological forces—so that it fits into

412. This may explain the limited progress that women have made in fashioning legal recognition for sexual harassment in the workplace. Behind such claims lies the specter of physical assault and rape, even though physical touching is not required to make out a prima facie case of either quid pro quo or hostile work environment sexual harassment. But a review of successful cases demonstrates that, absent some explicit sexual advance or physical touching, a woman's practical chances of prevailing on such a claim are quite slim. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710–38 (1998) (detailing the way in which courts have restricted the conception of hostile work environment harassment to male-female sexual advances and other explicitly sexualized actions). I suggest that the element of physicality may provide an explanation for feminists' recent progress in this area, in addition to judicial recognition of the complex female subject, as Abrams proposes. Abrams, *supra* note 407 (suggesting that sexual harassment might be a fruitful area of law for feminist exploration, because it recognizes that women can be constrained by systemic inequality and provides a complex depiction of women as simultaneously "agentic" and constrained).

413. It is also clear that while law reform may play a role in social transformation, the law has only a limited ability to alter widely shared basic assumptions that are at the core of our cultural ideology.

414. See discussion *supra* Part III.

the dominant framework's justifications for accommodation.⁴¹⁵ An alternative approach that might achieve the accommodations caregivers require while at the same time challenging the limited scope of the innocence and immutability bivalent would be to assert the fundamental morality of caregiving work, and the importance of such work to the sustenance of society.

I do not claim this to be a novel approach. Assertions of this kind have been interjected periodically into the decades-old colloquy among feminist legal theorists about the merits of the "special" versus equal legal treatment of women. In 1987, Christine Littleton compared the importance of women's caregiving work in society to that of military service, suggesting in *Reconstructing Sexual Equality* that women who leave the workforce for caregiving should receive honor, compensation, and job re-entry preferences comparable to those received by military veterans.⁴¹⁶ Lucinda Finley stated in her 1986 article *Transcending Equality Theory* that "[e]mployers should bear the costs of these [caregiving] responsibilities because child-bearing and rearing are *crucially important social functions* that are connected to and have major impacts on the work world. If the work world does not accommodate these functions, both it and society in general will suffer."⁴¹⁷ More recently, Martha Fineman has been developing a theory of collective societal responsibility for dependency to address the increasing inequitable and unequal distribution of societal resources that has resulted in the poverty of women and children.⁴¹⁸ The foundation for such a theory, she asserts, "must be grounded on an appreciation of the value of caretaking labor."⁴¹⁹ According to Fineman, caretaking labor "produces and reproduces society . . . [and] provides the citizens, the workers, the voters, the consumers, the students and others that populate society and its institutions."⁴²⁰ Mainstream scholars

415. *E.g.*, KITTAY, *supra* note 400, at 99 ("If the means by which a society distributes responsibility for dependency work is not guided by principles of justice, then coercive measures—often in the guise of tradition and custom, sometimes in the guise of merely apparent voluntary life choices—are the predictable response.").

416. Littleton, *supra* note 331, at 1330.

417. Finley, *supra* note 329, at 1175 (emphasis added).

418. Fineman, *supra* note 37, at 15–16.

419. *Id.* at 16.

420. *Id.* at 19. Fineman focuses her assertion of the fundamental morality of caregiving work on biological dependency, arguing that the inevitable and universal nature of biological dependency creates a societal debt and "claim of right." *Id.* at 16–18. She continues to justify the support for cultural or "derivative dependency," however, on a concept of bounded agency. Because "individual choice occurs within the constraints of social conditions," she argues, it is unjust for society not to support women's caregiving work. *Id.* at 21–22. Clearly, the fear of perpetuating gender roles that serve to limit women's opportunities continues to be significant to feminist legal theorizing. *See* note 357 and accompanying text.

also have begun to acknowledge the moral value of women's nurturing and the role of the family in "maintain[ing] an enduring society,"⁴²¹ in no small part due to the influence of feminist legal theorists.

Joan Williams has expressed reservations about the ability of broad assertions of morality or need to secure for women tangible accommodations in the workplace for their unpaid caregiving labor. She reminds us that "[i]n the U.S., 'rights talk' is a key resource for articulating moral claims in legal language."⁴²² But there does not have to be an "either/or" approach; developing a defining moral vision, even a utopian one as Fineman has done,⁴²³ does not preclude concrete claims of right. In fact, the former may be constitutive of the latter, for as the current legal framework demonstrates, practical claims for women's equal rights absent a unifying theoretical vision are unlikely to move our legal decision makers or society more broadly to recognize women's cultural caregiving.

It is also clear that part of this project will require feminist legal theorists to move beyond utilitarian justifications. In addition to articulating the value of caregiving to society, we need to provide a rich account of the fundamental importance of family caregiving work to women as individuals. Heretofore, feminist theorists have been hesitant to discuss the positive meaning for women *qua* women of their cultural caregiving, for fear of reinforcing harmful gender roles.⁴²⁴ This undertheorization limits our ability to respond to those who question the "special treatment" that parents, and women in particular, are allegedly receiving in the work-

Indeed, as Joan Williams recently observed, this fear largely has determined the approach within the public policy context. Williams, *supra* note 358, at 279-80.

But the price feminist theorists and women have paid for their strategic decision to limit their claims of right to women's biological difference has been too high. Such a cautious approach fails to challenge the dominant theoretical framework that categorizes innocent, immutable, *i.e.*, biological, dependency as deserving of accommodation, and dependency arising from women's cultural differences from men as undeserving. Moreover, this tempered equal treatment approach has resulted in laws such as Title VII and the Family and Medical Leave Act that protect women from discrimination only on the limited bases of childbirth and pregnancy, leaving women to grapple individually and privately with the costs of their cultural caregiving work.

421. Rawls, *supra* note 330, at 788.

422. Williams, *supra* note 358, at 316.

423. See FINEMAN, THE NEUTERED MOTHER, *supra* note 5, at 232.

424. Even Carol Gilligan's famous research on women's "different voice" focused on the moral significance of women's relational orientation, not upon the personal satisfaction, pleasure, or meaning to women of their allegedly unique value system. See GILLIGAN, *supra* note 36.

place.⁴²⁵ Opponents of social welfare programs and workplace regulation, and women for whom having children may not be central to their life plans,⁴²⁶ are asking why they should subsidize the private decisions of others to have children. The answer must provide a richer and more positive account of women's cultural caregiving work than can be conveyed by the stories of biology or gender socialization. For example, given our country's record of exploitation and control of the mothering and wage work of white working class women and women of color,⁴²⁷ family caregiving work for some women might be viewed as a form of powerful political resistance: a product of choice, not constraint or oppression. Feminists must begin to mine such complexity if they

425. *E.g.*, ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* (2000).

426. *E.g.*, Franke, *supra* note 35, at 183–89 (questioning the heteronormative assumptions of cultural feminists and arguing that society is reproduced through “countless reiterative practices” such as market-based consumption, not just biological reproduction). Franke’s criticism of feminist legal theorists’ normalization of white, middle-class, heterosexual motherhood, and of Martha Fineman’s work in particular, represents a fundamental misunderstanding of such work. Fineman uses “Mothering” as a metaphor for all caregiving labor, not just biological reproduction. *See* FINEMAN, *THE NEUTERED MOTHER*, *supra* note 5, at 235. Moreover, if there is any unifying theme in Fineman’s work, it is the destigmatization of mothering by single, minority women. *E.g.*, *id.* at 101–42. Fineman’s work, in its effort to expose the construction of single parenthood as a form of deviance, also serves to challenge the stigmatization of the sexual relationships of gay, lesbian, bisexual, and transgendered persons. Moreover, Fineman cannot be fairly read to “de-eroticize” women and mothers in a material sense. Rather, she aims to break the formal link between marriage and legal privilege that serves to constrain both women’s mothering and sexuality. *See id.* at 228–30. Fineman’s “Mother” is not a spinster, as Franke would have us believe, but a woman who is free to arrange her intimate sexual relationships as she pleases without suffering the punishment of stigmatization and economic marginalization should she also choose to be a mother. *Id.* at 229–30.

This does not mean that Franke is not on to something, however. Franke’s concern about feminist legal theory’s negative or nonexistent depictions of women’s sexuality are legitimate, though perhaps misdirected, and the analysis presented in this Article suggests a possible explanation. Franke asks why “feminists in other disciplines continue to simultaneously approach questions of sexuality in both negative (freedom from) and positive (freedom to) terms,” but feminists within law persist in reducing women’s sexuality to the negative experiences of “dependency and danger.” Franke, *supra* note 35, at 182–83. One explanation may lie in the theoretical context in which feminist legal theory emerged. Feminist legal theory developed in reaction to androcentric depictions of the individual presented in liberal legal and law and economic theory, and to the limiting effects of our law’s categorical framework and commitment to formal equality. *See supra* Parts III, IV. If feminist legal theorists have unduly focused on characterizing women’s sexuality as a site of danger and dependency, it is because they have been seeking to garner recognition of women’s experiences within the uniquely constraining discipline of law. *See supra* Parts III, IV. As such, Franke may be barking up the wrong theoretical tree. As this Article suggests, the culprit is law, not legal feminism. With this in mind, feminist legal theorists and queer theorists should be working together to transform the law. A good place to start might be a project that seeks to articulate the fundamental importance of women’s sexual pleasure and caregiving work.

427. *See supra* notes 39 and 46 and accompanying text.

are to respond to the limited ability of economic and liberal legal theory to recognize women's cultural experience of caregiving. We have begun to develop such a theory by exposing the universality of dependency⁴²⁸ and the society-reproducing function of caregiving work.⁴²⁹ An important additional account would explore the extent to which women's cultural caregiving might also be a product of choice, however constrained, and the positive meaning of that choice for women.⁴³⁰ A theory that presents women's cultural caregiving in all its messiness as a condition of oppression and power, drudgery and deep satisfaction, constraint and choice, will be fundamentally more transformative than one that rests upon squeezing women's caregiving experiences into the limited exceptions to the autonomous, equal, and rational person assumed by our dominant theoretical paradigms. Such a thick conception of caregiving also possesses greater potential to bring women together across their differences.

Quite simply, reasons matter, whether they are rooted in utopian visions or liberal rights discourse. Concrete outcomes achieved will always be a function of the justifications provided. In the face of the limits of formal equality analysis and the rhetoric of choice, justifying rights upon women's bounded agency is unlikely to produce anything greater than a legal regime protecting women from discrimination on the basis of their biological differences from men. For, in the discourse over difference, women's cultural differences are erased, because the theoretical frameworks that construct our law are blind to such differences. The implications of this problem with the current paradigm are serious: while unintended, justifications based upon a concept of socially-bounded agency will merely serve to reinforce the existing paradigm that relies upon biological difference as a basis for painfully limited accommodation (not to mention discrimination). Accordingly, the repeated assertion of the fundamental morality and value of caregiving work to society and to women is imperative for the project of developing an alternative theoretical framework that will successfully move the existing order. If women assert that they deserve rights because they are "equal" to men, they are likely to be af-

428. See *supra* notes 396–400 and accompanying text.

429. See *supra* notes 416–23 and accompanying text.

430. Vicki Schultz has called for a parallel exploration of the meaning of wage work for women. See Schultz, *supra* note 42. In doing so, she makes the controversial assertion that the recent successful effort to end welfare as a federal entitlement may have a silver lining, given that even mundane, dirty, or low-paid work carries fundamental political and social value for those who engage in it. *Id.* at 1942–44, 1932–35. I suggest in a similar vein that there is some fundamentally positive meaning to women of their caregiving work that must be explored, as uncomfortable or risky as such an endeavor may be.

forded rights only when they are in fact equal. If women assert that they deserve rights because gender socialization or biological forces dictate their caregiving, they will receive rights only during the limited circumstances when society considers their agency to be bounded. But if women assert that they deserve rights because caregiving work is fundamental to the functioning of society, the continuation of the human race, and the living of a full life, then women—and men for that matter—will be afforded rights when they engage in caregiving.

The utility of asserting the fundamental morality and importance to society and women of caregiving work should not be underestimated for another reason. While it may be true that formal equality language is key to achieving justice within the American legal system, the influence of recent developments in other areas of law upon the collective receptivity to accommodation as a legitimate solution to women's work/family conflicts should not be underestimated. Specifically, I am referring to the significant impact on the workplace and society more broadly of the Americans with Disabilities Act ("ADA"), passed in 1990 to require employers, governmental entities, and public accommodations to reasonably accommodate persons with disabilities so long as such accommodations do not effect a fundamental alteration of the workplace, program, or activity in question.⁴³¹ Similarly, Title VII's religious accommodation provisions, which mandate that employers accommodate the religious beliefs and observances of their employees unless doing so would cause the employer undue hardship, offers a promising model of substantive equality on which to build a theory of workplace accommodation for family caregiving responsibilities.⁴³² In fact, Title VII's religious accommodation principle is perhaps even more suited than the ADA to answer the rhetoric of choice that increasingly has come to pervade our political discourse and judicial decisions. Whereas the success of the ADA can be explained, in part, by the societal view of persons with disabilities as innocent and thereby deserving of assistance and accommodation, particularly persons with physical disabilities, Title VII's religious accommodation provision is based upon the notion that a person's religious practices are a fundamental right, even if

431. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (codified at 42 U.S.C. §§ 12101-12213 (1994)).

432. 42 U.S.C. § 2000e(j) (1994) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

voluntarily adopted.⁴³³ As such, it might be a fruitful paradigm for gaining workplace accommodations for family caregiving, which is constructed within our country's political and legal discourse as a cultural practice, not as an immutable biological difference.⁴³⁴

Of course, the ADA has been plagued by relatively successful attempts to squeeze the law into a formal equality box,⁴³⁵ by constitutional challenges,⁴³⁶ and by recent Supreme Court deci-

433. As aptly stated by Juan Perea:

We do not deem mutability relevant in protecting against discrimination because of religion, an aspect of ethnicity which is easily and sometimes actually changed. The possibility or actuality of religious transformation does not dampen the sincerity of religious belief nor dilute its fundamentality to a person's identity.

Perea, *supra* note 229, at 867.

434. Similar arguments have been made with regard to discrimination on the basis of national origin, race, and sexual-orientation. See William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2416–22 (1997); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 55, 57 (1991); Perea, *supra* note 229, at 860–61, 866–67.

435. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604 (1999) (finding that persons with mental disabilities have a right to state services in the most integrated setting appropriate for their disability only if they can demonstrate that to do so would be *equitable* given the resources of the state and the needs of others waiting for services).

436. See *Univ. of Ala. Bd. of Tr. v. Garrett*, No. 99-1240, 2001 WL 167628 (U.S. Feb. 21, 2001) (holding ADA Title I provisions permitting state employees to sue states in federal court for monetary damages for employment discrimination unconstitutional under the 11th Amendment); see also, e.g., *Dare v. California*, 191 F.3d 1167, 1175 (1999) (challenging constitutionality of Title II of the ADA); *Brown v. N.C. Div. Motor Vehicles*, 166 F.3d 698, 705 (4th Cir. 1999) (same); *Coolbaugh v. Louisiana*, 136 F.3d 430, 438 (5th Cir. 1998) (same); *Kimel v. Fla. Bd. of Regents*, 139 F.3d 1426, 1433, 1442–43 (11th Cir. 1998) (same); *Clark v. California*, 123 F.3d 1267, 1270–71 (9th Cir. 1997) (same); *Crawford v. Ind. Dep't of Corr.*, 115 F.3d 481, 487 (7th Cir. 1997) (same).

The *Garrett* case is part of a larger project of the current majority of the Court to resuscitate meaningful constitutional federalism. See *Morrison v. United States*, 529 U.S. 598 (2000) (striking down a portion of the Violence Against Women Act (VAWA) as exceeding Congress' power under the Commerce Clause and section five enforcement of the Fourteenth Amendment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that Congress did not have section five authority to abrogate states' Eleventh Amendment immunity from suit under the Age Discrimination in Employment Act of 1967 (ADEA)); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as exceeding Congress' section five enforcement power under the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating the Brady Handgun Control Act because it "commandeered" state executive officials to implement a national program); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacks power under the Commerce Clause to abrogate the immunity from suit in federal court afforded the states by the Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act as exceeding Congress' power under the Commerce Clause).

These decisions, which, *inter alia*, limit Congress' power to enact civil rights statutes that go beyond the Court's equal protection jurisprudence, threaten the continued viability of the FMLA, and certain provisions of Title VII as well, at least with regard to state employers. E.g., *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000) (holding FMLA provision permit-

sions limiting the definition of disability under the Act.⁴³⁷ Similarly, the Supreme Court's cramped interpretation of Title VII's religious accommodation principle has limited its utility for workers seeking accommodation of their religious practices.⁴³⁸ Still, there remains room under both statutes for fact-finders to conclude that an employee has been discriminated against by an employer's failure to recognize and accommodate her differences. And while the resilience and disciplining nature of formal equality within our legal system should not be trivialized—indeed cannot—it also can be said that these laws have transformed the way in which we think about discrimination, sowing within the public consciousness a visceral understanding of the meaning of substantive equality. As such, the time may be ripe for feminist legal theorists to bring their call for the accommodation of women's caregiving work out of the academic "closet" and into the policy arena. Of course, practical policy proposals need not mirror these statutes, but they can at least build upon the political capital generated by the model of substantive equality underlying them, particularly the more recently passed ADA.

ting state employee to take leave to care for seriously ill family member and the employee's own serious health condition unconstitutional); *In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1318–20 (11th Cir. 1999) (rejecting argument by state that, because only disparate treatment is recognized under the Fourteenth Amendment, Title VII's disparate impact provisions are not a valid exercise of Congress' section five enforcement power). For a general discussion and defense of our country's anti-discrimination laws in light of the Court's recent federalism jurisprudence, see Robert C. Post & Reva B. Siegal, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

437. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that severely myopic applicants, who were denied positions as global airline pilots because they failed to meet airline's minimum visual requirement, were not "disabled" within the meaning of the ADA, because applicants could fully correct their visual impairment with corrective lenses); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999) (holding that an employee was not "disabled" due to his high blood pressure, within the meaning of the ADA, where condition could be controlled through medication); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that an employee with monocular vision was not "disabled" within the meaning of the ADA, where his brain developed subconscious mechanisms for coping with his visual impairment and thus his body compensated for his disability). Such limitations are consistent with this Article's thesis about innocence and immutability. *But cf. Cleveland v. Policy Mgmt. Sys. Corp.*, 527 U.S. 795 (1999) (finding that a person who claims she is disabled for the purpose of receiving Social Security Disability benefits is not estopped from pursuing an ADA claim). See generally Symposium, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

438. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (narrowly defining reasonable accommodation); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (defining undue hardship as any cost to an employer that is more than de minimis). For an analysis of the exceptionally narrow religious accommodation jurisprudence that has developed under Title VII, see Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 389–92 (1997).

B. Law

Were we to shift the theoretical justifications for accommodating women's unpaid caregiving work in the workplace from notions of innocence and immutability to a generalized concept of the fundamental importance to society and individuals of such work, what might our employment discrimination laws look like and how might they be applied differently by judicial decision makers? First, I suggest that our country's employment discrimination laws can provide greater recognition of women's unpaid caregiving work even as presently configured. Recall the sex-plus theory of discrimination under Title VII and the requirement that the "plus" characteristic in question must be an immutable trait or a fundamental right as a predicate to demonstrating a prima facie case of unlawful sex discrimination.⁴³⁹ Were caregiving work valued as fundamental to the functioning of society, and to living a full life, then the assertion that engaging in such work is a "fundamental right" deserving of accommodation or at least non-discrimination in the workplace would not entail a vast judicial leap.⁴⁴⁰ Moreover, in such a world, perhaps courts would scrutinize more closely employers' stated job requirements in determining whether a plaintiff is "qualified for the position" under the *McDonnell Douglas* framework and in deciding whether an employer has demonstrated a legitimate BFOQ defense. Rather than blindly accepting employers' stated job qualifications, valuing caregiving work would require courts to balance employers' and employees' stated needs in a manner that is more respectful of caregiving work. Such a sensitive application of the sex-plus theory would not transform Title VII into a law requiring accommodation of women's caregiving work, but it might result in a favorable outcome for more women plaintiffs, particularly those who can demonstrate that their competing caregiving responsibilities would not fundamentally impinge on the workplace. For example, Alicia Martinez, who required only three, twenty-minute breaks a day to

439. See *supra* Part II.B.

440. Whether such a fundamental right to engage in caregiving would have to find its source in the Constitution has not been addressed by courts applying the *Willingham* test for sex-plus discrimination under Title VII, see *supra* note 102, but there are certainly arguments that such a constitutional right could exist. E.g., Catherine G. Meier, *Protecting Parental Leave: A Fundamental Rights Model*, 33 WILLAMETTE L. REV. 177 (1997) (arguing that caregiving is protected by the fundamental constitutional right to privacy which the Court has read into the Fourteenth Amendment Substantive Due Process Clause).

pump her breast milk, might have benefited from such a sensitive application of the sex-plus theory under Title VII.⁴⁴¹

How else might a theory grounded in the fundamental value of women's caregiving work alter our antidiscrimination laws? Certainly, the identification of "neutral" employer policies and practices that negatively and disproportionately impact women might be facilitated by a theoretical framework grounded in the value of caregiving work. Viewed through the lens of such a framework, employer "non policies" such as long work hours and rigid work schedules that heretofore have been subsumed within the definition of work in America might more readily appear to plaintiffs and judicial decision makers as what they truly are: affirmative employment practices that disproportionately discriminate against women. Further, in a world where judicial decision makers recognized and valued women's caregiving labor, courts might be less accepting of employers' business necessity defense and more receptive to less discriminatory alternatives to the current structure of market work.

Admittedly, such solutions are premised upon the transformation of societal attitudes, and in particular, upon the transformation of judges' attitudes. A solution to women's work/family conflicts so dependent upon judicial discretion, even if such attitudinal shifts could be achieved, is unlikely to effect the structural, institutional changes necessary to resolving the problems outlined in this Article. But such a vision of the transformation in judicial values is a necessary start, which, in essence, is why theory matters. As Robin West has asserted, "[t]he work of doing legal justice—of remaining true to a judicial oath [of integrity and fidelity] . . .—must be in the service of values which are life-affirming, if the result is to be justice, and a just society worthy of the name."⁴⁴²

Beyond the benefits to individual plaintiffs that would follow from a recognition by judicial decision makers of the value of caregiving labor, there are a number of concrete legal reforms that would flow from a shift in our theoretical vision. Clearly, there are too many to discuss in detail here, including an ADA-like statute requiring the accommodation of caregiving work, referenced above; expansion of the Family and Medical Leave Act;⁴⁴³ government-subsidized wage-replacement for caregiving, in the form of unemployment or disability insurance coverage, vouchers, welfare,

441. See discussion *supra* Part II.B.1.b.ii.

442. WEST, *supra* note 35, at 49.

443. See discussion *infra* notes 450–53 and accompanying text.

or refundable tax credits;⁴⁴⁴ universally available, high-quality day-care, implemented through subsidies to private providers, vouchers for families, the expansion of Head Start,⁴⁴⁵ the public education system,⁴⁴⁶ or other innovative mechanisms;⁴⁴⁷ and a shortened standard work week,⁴⁴⁸ just to name a few. These reforms present a range of visions of the role of the family, market, and state in solving the crisis of care in America. They have been and are likely to continue to be hotly debated within policy and academic circles. While such proposals do not seem imminent given the ossification of the values of autonomy, equality, and choice within the American political and legal landscape, there are a few concrete reforms that I will briefly address, because they are currently on the table.

In his 1999 State of the Union address, former President Clinton advocated the expansion of the FMLA to "smaller companies," citing "all of the evidence that it has been so little burdensome to employers."⁴⁴⁹ Since that time, several bills have been introduced in both houses of Congress to extend FMLA coverage to employees at worksites with at least twenty-five (as opposed to fifty) employees.⁴⁵⁰

444. The primary program currently in place is the Dependent Care Tax Credit. See 26 I.R.C. § 21 (2000).

445. Head Start is a federal matching grant program that provides early childhood education and other services to low-income children. 42 U.S.C. §§ 9831-9852 (1994). For a general discussion of Head Start and proposals for its expansion, see Edward M. Kennedy, *A Legislative Approach to Work and Family: Time for a Smart Start*, 26 HARV. J. ON LEGIS. 391 (1989) (advocating widely available early childhood education for preschool-age children).

446. E.g., MARTIN CARNOY, *SUSTAINING THE NEW ECONOMY: WORK, FAMILY, AND COMMUNITY IN THE INFORMATION AGE* (2001) (arguing that the new economy has placed an increased premium on education and has exacerbated work/family tensions, and envisioning schools and universities as the community centers and care providers of the future); ANTHONY RADEN, *UNIVERSAL PREKINDERGARTEN IN GEORGIA* (Found. for Child Dev., Working Paper, Aug. 1999), available at <http://www.ffcd.org/ourwork.htm> (reviewing the history, development, and lessons learned from the country's first universal prekindergarten program).

447. E.g., Natalie M. Hanlon, Note, *Child Care Linkage: Addressing Child Care Needs Through Land Use Planning*, 26 HARV. J. ON LEGIS. 591 (1989) (advocating regulations requiring commercial developers to provide child care facilities in new or renovated construction); Selmi, *supra* note 131, at 770-81 (advocating amendment of the FMLA to require or encourage male employees to take family leave to care for newborns).

448. Jacobs & Gerson, *Work Week*, *supra* note 234, at 466-70 (advocating expansion of the Fair Labor Standards Act's overtime provisions to professional and managerial employees, the provision of mandatory proportional benefits to all workers, and shortening of the standard work week); Schultz, *supra* note 42, at 1957 (advocating an amendment of the Fair Labor Standards Act to reduce the standard workweek to thirty-five or even thirty hours per week for everyone).

449. 'My Fellow Americans . . . State of Our Union is Strong,' WASH. POST, Jan. 20, 1999, at A12.

450. Family and Medical Leave Fairness Act of 2001, S. 18, 107th Cong. § 512; Family and Medical Leave Fairness Act of 2001, H.R. 265, 107th Cong. § 512; Family and Medical Leave Fairness Act of 1999, S. 201, 106th Cong. § 3; Family and Medical Leave Improve-

In both the 106th and 107th Congresses, representatives introduced legislation seeking to expand the activities covered by the Family and Medical Leave Act to include participating in a child's school or extracurricular activities,⁴⁵¹ accompanying an elderly relative to a medical appointment,⁴⁵² and caring for seriously ill family members outside of the traditional nuclear family.⁴⁵³

For the first time since the FMLA was enacted, federally-subsidized wage-replacement may be an option for those taking parental leave. In a May 24, 1999 memorandum, former President Clinton directed the federal Department of Labor "to propose regulations that enable States to . . . [use] the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child."⁴⁵⁴ In December 1999, the Department of Labor issued a notice of proposed rulemaking in accordance with the President's directive,⁴⁵⁵ and the regulation and final rule were promulgated in June 2000.⁴⁵⁶ The regulation "allows the States to develop and experiment with innovative methods for paying unemployment compensation to parents on approved leave or who otherwise leave employment to be with their newborns or newly-adopted children."⁴⁵⁷ In furtherance of this initiative, Clinton's 2001 fiscal year budget included \$20 million to fund roughly fifteen competitive planning grants for states to study and develop

ments Act of 1999, H.R. 91, 106th Cong. § 2; Family and Medical Leave Enhancement Act, H.R. 2103, 106th Cong. § 2 (1999).

451. Time for Schools Act of 2001, S. 18, 107th Cong. § 522 (amending the FMLA to allow employees to take twenty-four hours of "school involvement" leave per year to participate in the academic school activities of their children or to participate in literacy training); Time for Schools Act of 2001, H.R. 265, 107th Cong. § 522 (same); Time for Schools Act of 1999, S. 1304, 106th Cong. (same); Family and Medical Leave Act of 1993 Enhancement Act, H.R. 2103, 106th Cong. (1999) (amending the FMLA to allow employees to take up to twenty-four hours per year for "parental involvement leave" to participate in their children's educational and extracurricular activities); Family and Medical Leave Improvements Act of 1999, H.R. 91, 106th Cong. § 3 (same).

452. Family and Medical Leave Act of 1993 Enhancement Act, H.R. 2103, 106th Cong. (1999) (amending the FMLA to allow employees to take up to twenty-four hours per year to assist elderly relatives); Family and Medical Leave Improvements Act of 1999, H.R. 91, 106th Cong. § 3 (amending the FMLA to allow employees to take up to twenty-four hours per year of "elder care" leave to accompany an elderly relative to routine medical appointments).

453. H.R. 2104, 106th Cong. (1999) (amending the FMLA to permit leave to care for a domestic partner, parent-in-law, adult child, sibling, or grandparent if the person has a serious health condition).

454. President's Memorandum on New Tools to Help Parents Balance Work and Family, 35 WEEKLY COMP. PRES. DOC. 978, 979 (May 31, 1999), *available at* 1999 WL 12654559.

455. Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (1999) (proposed Dec. 3, 1999).

456. Regulations for Birth and Adoption Unemployment Compensation, 20 C.F.R. § 604 (2000); Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13, 2000).

457. 20 C.F.R. § 604.1.

wage-replacement programs for workers taking family leave.⁴⁵⁸ Prior to the adoption of this regulation, states were prohibited from using their unemployment insurance programs for employees who voluntarily left their jobs for family reasons without jeopardizing their receipt of federal matching funds.⁴⁵⁹ These recent regulatory changes are the culmination of a decade of advocacy.⁴⁶⁰ Since the rule change has gone into effect, legislation has been introduced in fifteen states that would expand unemployment insurance to cover family leaves.⁴⁶¹

Finally, a member of Congress recently introduced legislation that would expand the Pregnancy Discrimination Act to include breast feeding in Title VII's definition of sex, and would amend the Internal Revenue Code to provide tax credits to businesses that provide appropriate facilities for their employees to breast feed or pump breast milk.⁴⁶²

458. White House Press Release, President Clinton Announces New Funds Enabling States to Provide Paid Leave to America's Working Parents (Feb. 12, 2000), *available at* 2000 WL 150966. The Congressional version of this proposal is the Family Income to Respond to Significant Transitions Insurance Act, establishing a grants program to states for demonstration projects that provide wage replacement to individuals responding to family caregiving needs. *See* H.R. 226, 107th Cong. § 5 (2001); S. 18, 107th Cong. § 504; S. 1355, 106th Cong. § 5 (1999); H.R. 2500, 106th Cong. § 5 (1999).

459. Specifically, prior administrative interpretations of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311 (1994), conditioned matching funds to states upon state rules excluding those who depart work voluntarily or are not "able and available" for work. *See, e.g.*, 20 C.F.R. § 614.

Such rules were at issue in *Wimberly v. Labor & Industrial Relations Committee*, 479 U.S. 511 (1987), in which the Supreme Court held that FUTA permitted Missouri to disqualify from eligibility for unemployment compensation workers who voluntarily quit their jobs due to pregnancy, so long as it similarly excluded all workers who terminate their employment for non-work related reasons.

460. *See* Brown, *supra* note 132; Mary F. Radford, *Wimberly and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy*, 63 N.Y.U. L. REV. 532 (1988); Elizabeth F. Thompson, Note, *Unemployment Compensation: Women and Children—The Denials*, 46 U. MIAMI L. REV. 751 (1992).

461. S. 1059, 45th Leg., 1st Reg. Sess. (Ariz. 2001); H.R. 2458, 45th Leg., 1st Reg. Sess. (Ariz. 2001); S. 500, 2001 Leg., 103d Reg. Sess. (Fla. 2001); H.R. 342, 146th Gen. Assem., Reg. Sess. (Ga. 2001); S. 892, 21st Leg. (Haw. 2001); H.R. 30, 21st Leg. (Haw. 2001); S. 389, 92d Gen. Assem. (Ill. 2001); H.R. 1783, 112th Gen. Assem., 1st Reg. Sess. (Ind. 2001); H.R. 2232, 79th Leg., 2001 Reg. Sess. (Kan. 2001); H.R. 933, 2001 Leg., 415th Sess. (Md. 2001); H.R. 744, 182d Gen. Ct., 2001 Reg. Sess. (Mass. 2001); L. 370, 97th Leg., 1st Reg. Sess. (Neb. 2001); S. 1923, 209th Leg. (N.J. 2000); A. 3049, 209th Leg. (N.J. 2000); H.R. 528, 45th Leg., 1st Reg. Sess. (N.M. 2001); S. 241, 71st Leg., Reg. Sess. (Or. 2001); H.R. 240, 77th Leg. (Tex. 2001).

462. Breastfeeding Promotion Act, H.R. 285, 107th Cong. §§ 103, 201 (2001) (amending the Civil Rights Act of 1964, 42 U.S.C. 2000e(k), by inserting "lactation" after pregnancy, and amending the Internal Revenue Code to provide for tax credits to businesses that provide an appropriate environment on their premises for employed mothers to breastfeed or express their breast milk); Pregnancy Discrimination Act Amendments of 1999, H.R. 1478, 106th Cong. (amending the Civil Rights Act of 1964, 42 U.S.C. 2000e(k),

It is too soon to know whether or to what extent the new president will support any of these policy initiatives, but opposition by conservative members of Congress and the business community is certain.⁴⁶³ Just two weeks after the Department of Labor promulgated the unemployment insurance regulation, two small businesses and a coalition of business organizations filed a lawsuit challenging it under the Federal Unemployment Tax Act (FUTA),⁴⁶⁴ the Administrative Procedure Act (APA),⁴⁶⁵ and the FMLA.⁴⁶⁶ Legislation proposing to expand the coverage of the FMLA and PDA has been introduced and died in committee for several years.⁴⁶⁷

Moreover, even were these reforms to survive the political process, they would not significantly address the serious limitations of the FMLA and the PDA. Unemployment benefits are minimal in most states, averaging \$193.00 per week.⁴⁶⁸ While expanding coverage of the FMLA to smaller businesses will bring many more employees within the Act's protections, adequate wage replacement is key to making leave a viable option. The proposed "parental involvement" and "elder care" leaves are symbolic more than anything else, providing only three days per year of leave,

by inserting "breast feeding" after pregnancy) (both sponsored by Rep. Carolyn B. Maloney of New York).

463. 145 CONG. REC. S10,434 (daily ed. Aug. 5, 1999) (statement of Sen. Gregg) ("Mr. President, to consider expansion [of the FMLA] at this time is not just irresponsible, it is unconscionable."); Fowler W. Martin, *Plan to Fund Family Leave Raises Concerns*, WALL ST. J., June 8, 1999, at B11A (reporting that the business community is claiming that changes to the federal unemployment insurance program to cover FMLA leave cannot be legally effected through the administration process, as former President Clinton has proposed).

464. 26 U.S.C. §§ 3301-3311 (1994).

465. 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. IV 1998).

466. 29 U.S.C. §§ 2601-2654 (1994); *see also* Complaint for Declaratory, Injunctive and Other Relief, LPA, Inc. v. Herman, No. 00-CV-1505 (D.D.C. 2000) (on file with author). Specifically, the complaint alleges that: (1) the regulation violates FUTA, because FUTA permits states to pay unemployment compensation only to individuals who are unemployed, not to individuals who have suitable work available to them but voluntarily leave work; (2) the regulation and rule violate the FMLA, because state unemployment benefits are employer financed, and, in enacting the FMLA, Congress "determined that, as a general rule, employers should be required to provide leave but not required to pay for that leave"; and (3) the regulation and rule are arbitrary and capricious under the APA, "because, among other things, the Regulation reverses the Department of Labor's long-standing interpretation of federal unemployment compensation law without determining that the Department's new interpretation will promote the goals of that law, because the Rule fails to consider the legitimate interests of businesses, because the Rule fails to place any principled limitation on the payment of unemployment compensation to individuals on personal leave, and because of various procedural violations including the failure to subject the Department's regulatory impact analysis to public comment." *Id.* ¶ 3.

467. *See supra* notes 452, 453, and 462.

468. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: THE NAT'L DATA BOOK 395 tbl.625 (119th ed. 1999) (1997 data).

enough for the annual school play and a couple of medical appointments, but nothing near what is required for day-to-day caregiving of children or elderly parents.⁴⁶⁹ Furthermore, still unresolved would be the exclusion of those employees who do not work at least twenty-five hours per week on average or who have not worked for their current employer for at least a year—employees more likely to be women and people of color.⁴⁷⁰

The inclusion of breast feeding in the Title VII's definition of sex is the proposal most likely to be adopted given the law's bias toward accommodating women's biologically-based differences from men.⁴⁷¹ This proposal would prevent a court from dismissing out-of-hand a Title VII claim of discrimination on the basis of breast feeding, and may be of some assistance to a women who can convince a court that her breast feeding would not significantly disrupt the workplace, like Alicia Martinez, who sought a few breaks and a private place to express her breast milk.⁴⁷² However, it is unlikely that such an amendment to the PDA would change the outcome for women like Rebecca Maganuco and Michele McNeill, who sought more significant accommodations, such as time off from work to breast feed.⁴⁷³ And, of course, the limited recognition of breast feeding does not address the bulk of life's caregiving work, which extends to children who are not newborns and to adults who are dependent due to sickness, disability, or age. In sum, adding breast feeding to Title VII's definition of sex may be of help to some women, but it will not transform the PDA into a tool that can fundamentally challenge the structure of the American workplace.

Still, the proposed amendments to the FMLA, PDA, and our country's unemployment compensation laws represent a small, positive step in the right direction. They are a strong symbolic acknowledgment that caregiving work extends beyond the first three months of a child's life and that paid leave is crucial to making caregiving leave a reality. Moreover, in the words of Mark Tushnet, perhaps "itsy-bitsy" measures are all that can be expected given "the reduced scope of national government in the new constitutional order" that has taken hold over the past two decades.⁴⁷⁴

469. See *supra* legislative proposals cited notes 451–52.

470. See *supra* Part II.C.

471. See *supra* note 462 and accompanying text.

472. See *supra* Part II.B.1.b.ii.

473. See *supra* notes 139–57 and accompanying text.

474. Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 40 n.41, 55–56 (1999).

At the same time, this "new constitutional order" makes a broader vision all the more important. It is my hope that this analysis of the limiting effects of the theories which predominate our law on the recognition of women's work/family conflicts, and the suggestion that we must shift our attention from depictions of women as constrained by gender socialization toward recognizing the fundamental importance of caregiving work, can serve as a useful beginning for such a vision.

CONCLUSION

American employment antidiscrimination laws do not adequately address the conflict between women's labor force participation and their disproportionate responsibility for caregiving within the family. Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, the Family and Medical Leave Act, and judicial decisions interpreting these statutes provide job security to some relatively privileged women in the limited instances of pregnancy and childbirth. In contrast, women's experience of cultural caregiving is virtually unrecognized by our laws prohibiting sex discrimination in the workplace. In particular, while women receive some limited protections if they can prove that they have not been hired or promoted based upon "stereotypical" assumptions about their role as primary caregivers, once employed, women remain largely unprotected from demotion or termination on the basis of their culturally-based, *i.e.*, non-biological, family caregiving labor. This failure of our law has contributed to the perpetuation of a labor force attachment gap between men and women, persistent inequality in the economic status of women, and the widespread impoverishment of children in America.

This Article has suggested that the stunted response of American employment discrimination law to women's work/family conflicts is influenced, in part, by certain core values and assumptions within our legal tradition, particularly the value of formal equality and the assumption that legal agents are rational decision makers. Such robust doctrines cannot be dislodged or even modestly disrupted through theoretical approaches that seek to fit women's experiences of caregiving into the existing paradigm. As such, the argument by many feminist legal theorists that employers and the state should support women's family caregiving because such work is dictated by gender roles will not succeed in a significant transformation of the existing framework. Such an approach,

by focusing on women's bounded agency, merely seeks to include women's cultural caregiving within the existing paradigm that defines biological incapacity as the outer limit of the law's protection.

An alternative approach that might achieve the accommodations caregivers require while at the same time challenging the existing framework would be to assert the fundamental morality of caregiving work, and the importance of such work to the sustenance of society and living a full life. While such a normative solution represents a significant departure from law's premise of neutrality, I contend that a defining moral vision must inform practical claims of right before our legal decision makers, or society more broadly, will be moved to recognize women's cultural caregiving work. With such a normative vision in mind, perhaps a more refined version of equality, autonomy, and rational choice that accounts for differences between men and women with regard to caregiving work might be possible. Moreover, given the influence of recent developments in other areas of law upon the collective receptivity to accommodation as a legitimate model of equality, the time may be ripe for feminist theorists to bring their call for the accommodation of women's caregiving work into the policy arena. Only when acknowledged and valued will women's cultural caregiving work be recognized within our law and society.